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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1958

No. 414

UNION PACIFIC RAILROAD COMPANY,
PETITIONER,

vs.

L. L. PRICE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 2, 1958
CERTIORARI GRANTED NOVEMBER 17, 1958

No. 15649

United States
Court of Appeals
for the Ninth Circuit

L. L. PRICE, Appellant,

vs.

UNION PACIFIC RAILROAD, Appellee.

Transcript of Record

Appeal from the United States District Court for the District of Nevada

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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For the Appellee.

In the District Court of the United States
for the District of Nevada

No. 117

L. L. PRICE, Plaintiff,

vs.

UNION PACIFIC RAILROAD, Defendant.

COMPLAINT

I.

Plaintiff is a citizen of the State of Nevada and defendant is a corporation incorporated under the laws of the State of Utah. The matter in controversy, exceeds, exclusive of interest and costs, the sum of Three Thousand ($3,000.00) Dollars.

II.

Plaintiff was employed by defendant as a trainman from on or about September 11, 1942, until he was notified by defendant on or about July 24, 1949, that he was dismissed.

III.

For many years prior to and until the said dismissal, plaintiff was a member of the Brotherhood of Railway Trainmen.

IV.

From April 1, 1943, up to and including July 24, 1949, there was in effect a written collective bargaining agreement and other written agreements between the said Brotherhood of Railway Trainmen

and defendant. Plaintiff duly performed all terms and conditions of the said agreements required on his part to be performed.

V.

The dismissal of plaintiff by defendant was wrongful and in violation of the said agreements in the following respects:

(a) There was no thorough investigation made of alleged faults on the part of plaintiff.

(b) Plaintiff was not afforded an opportunity to have a trainman of his choice present at the investigation held.

(c) Plaintiff was not afforded a reasonable opportunity to prepare his defense.

(d) Plaintiff was not afforded a reasonable opportunity to present his defense at the said investigation.

(e) Plaintiff was not present at the said investigation.

(f) Plaintiff was not afforded an opportunity to have witnesses present in his behalf at the said investigation.

(g) Plaintiff was denied the right to have witnesses present in his behalf at the said investigation at the expense of defendant.

(h) Plaintiff was not afforded a reasonable opportunity to participate in his own defense at the said investigation.

(i) Plaintiff was dismissed without cause.

VI.

As a direct and proximate result of said wrong-

ful dismissal, plaintiff has at the time of the filing of this complaint lost earnings in the amount of $18,517.00.

VII.

As a direct and proximate result of said wrongful dismissal, plaintiff will lose future earnings and valuable seniority, retirement, hospitalization, and transportation rights.

Wherefore, plaintiff demands judgment against defendant in the sum of One Hundred and Eighteen Thousand Five Hundred and Seventeen ($118,517.00) Dollars, and costs.

RALLI, RUDIAK & HORSEY,
/s/ By SAMUEL S. LIONEL,
Attorneys for Plaintiff.

[Endorsed]: Filed June 6, 1955.

National Railroad Adjustment Board
First Division

Docket No. 27393

Parties to Dispute: Brotherhood of Railroad Trainmen, Union Pacific Railroad Company (South Central District).

EMPLOYEES' SUBMISSION EX PARTE

Statement of Claim

Claim for restoration to service with all rights unimpaired and for pay for all time lost for Brakeman L. L. Price since July 13, 1949.

Statement of Facts

On July 12, 1949, Brakeman L. L. Price regularly assigned to the brakemen's extra board at Las Vegas, Nevada, which protects extra service in both directions from Las Vegas, Nevada, was called to deadhead on train No. 37, a passenger train, from Las Vegas, Nevada, to Nipton, California, a station en route 56.7 miles west of Las Vegas, for swing service. Train No. 37 arrived at Nipton, California, at 10:30 P.M. on July 12. Brakeman Price immediately contacted the train dispatcher at Nipton, and was advised that his services as swing brakeman (a third brakeman who is not a regularly assigned member of the crew) from Nipton, California, would be utilized on extra 1622 east which was due to arrive at Nipton at about 4:30 A.M.. Brakeman Price informed the train dispatcher that he was returning to Las Vegas, Nevada, for the purpose of securing food, there being no eating facilities at Nipton or at any point en route between Nipton and Las Vegas. Brakeman Price returned to Las Vegas on extra 1623 east at 12:35 A.M. on July 13.

After obtaining food, Brakeman Price called the train dispatcher and advised him that he (Brakeman Price) was ready to return to Nipton on a freight train due to depart from Las Vegas at 1:45 A.M. The train dispatcher instructed Brakeman Price at that time that he need not return to Nipton. Upon receipt of such instructions, Brakeman Price properly registered in on the brakemen's register book at Las Vegas and returned to his

home. Brakeman Price was held from service effective at 9:05 A.M. on July 13, and at 7:00 P.M. on July 16 he received a notice to appear for an investigation at 10:00 A.M. on July 17, as indicated in Employees' Exhibit B.

On July 17 Brakeman Price consented to postponement of the investigation until 9:30 A.M. on July 18, as indicated in Employees' Exhibit C. On July 18 Brakeman Price appeared for the investigation and requested postponement until his representative (B.R.T. Local Chairman) could be present to represent him, as indicated in Employees' Exhibit D. On July 24, 1949, Brakeman Price was discharged from the services of the carrier.

Position of Employees

That Brakeman L. L. Price was dismissed from service unjustly and without recourse in violation of the agreement under which he was working at the time of his dismissal is supported by the provisions of Section (a) of Article 33 of the agreement effective April 1, 1943, governing wages and working conditions of conductors, brakemen, and train baggagemen, reading as follows:

> "When a trainman is suspended for an alleged fault, no punishment will be fixed without a thorough investigation, at which the accused may have a trainman of his choice present. Ordinarily such an investigation will be held within seven (7) days from date of suspension; if found innocent he will be reinstated and paid for time lost. All witnesses shall, after giving

"their testimony at an investigation, remain present during the continuance of such investigation. Copy of his statement will be furnished, which employee must sign. Transcript of testimony of all witnesses will be furnished to the General Chairman upon request when discipline is administered."

That portion of the above rule reading:

"* * * no punishment will be fixed without a thorough investigation, at which the accused may have a trainman of his choice present." (Underscore ours)

was grossly ignored by the carrier in dismissing Brakeman Price.

The employees contend that that portion of the Notice of Hearing, identified herein as Employees' Exhibit B, reading as follows:

"You may produce such witnesses as you may desire, at your expense."

is contrary to the above referred to Section (a) of Article 33 and is in no way a part of the agreement between the employees and the carrier and that this portion of the Notice of Hearing was, within itself, the principal contributor to the request for the first postponement, identified herein as Employees' Exhibit C. Witnesses whose testimony was considered pertinent in developing the facts relative to the carrier's charges against Brakeman Price were not available at Las Vegas on July 17. As indicated on

page 3 of Employees' Exhibit A in the following question and answer:

> "Q. Was he advised that the investigation would be deferred until 2:30 P.M. today for him to get some other representative?
>
> "A. Yes, sir."

representatives of the carrier were obviously aware that the Local Chairman was not available in Las Vegas and that it was Brakeman Price's desire to have the Local Chairman represent him. The arbitrary action of the carrier's representatives is indicative of their deliberate attempts to deprive Brakeman Price of an investigation in accordance with the agreement under which he was employed.

The employees further contend that Brakeman Price did not violate any rules in leaving Nipton to secure food. That Brakeman Price was justified in these actions is supported by the provisions of Section (b) of Article 32 of the agreement effective April 1, 1943, reading as follows:

> "Swing brakemen will not be tied up nor released at points where sleeping and eating accommodations are not available."

It is questionable whether the services of Brakeman Price as swing brakeman were needed at all at Nipton on the date in question, and it is apparent that his services were not needed at a time which would necessitate his being deadheaded from Las Vegas on train No. 37. It will be noted that his services were never utilized from Nipton to Las Vegas and neither was any other brakeman sent

from Las Vegas to protect the services originally intended for Brakeman Price.

It is further interesting to note that at the time of this incident (July 12, 1949) representatives of the carrier had arbitrarily, without negotiation, set up a condition wherein swing brakemen (a third brakeman who is not a regularly assigned member of the crew) would detrain at Nipton, California, a station en route, without satisfactory eating and sleeping facilities and without any eating facilities during the hours from 8:00 P.M. to 6:00 A.M. Such arbitrary action of the carrier's representatives, in their efforts to nullify the provisions of Section (b) of Article 32 governing tie-ups and releases of swing brakemen, resulted in a dispute which prompted the employees' representatives to request that the National Mediation Board take jurisdiction. At the time of the occurrence resulting in this controversy, negotiations were being conducted in Salt Lake City, Utah, with the assistance of a member of the National Mediation Board and the Assistant to the President of the Brotherhood of Railroad Trainmen, in National Mediation Board Case No. 3172. Such negotiations resulted in the consummation of the agreement attached hereto and identified as Employees' Exhibit K.

In further support of the employees' contentions enumerated herein is a copy of the transcript of the so-called investigation conducted by officers of the carrier, the employees not participating, identified as Employees' Exhibit A; the carrier's Notice of Hearing dated July 16, 1949, identified as Em-

ployees' Exhibit B; postponement of investigation scheduled for July 17, identified as Employees' Exhibit C; request for postponement of investigation on July 18, identified as Employees' Exhibit D; General Chairman's submission to the General Manager under date of March 27, 1950, identified as Employees' Exhibit E; General Manager's reply to General Chairman under date of March 30, 1950, identified as Employees' Exhibit F; General Chairman's reply to the General Manager on April 5, 1950, identified as Employees' Exhibit G; the General Manager's position, subsequent to conference, dated May 22, 1950, identified as Employees' Exhibit H; General Chairman's letter of May 31, 1950, to General Manager requesting joint submission to the First Division of the National Railroad Adjustment Board, identified as Employees' Exhibit I; General Manager's reply of July 5, 1950, identified as Employees' Exhibit J; Mediation Agreement No. 3172 dated July 15, 1949, identified as Employees' Exhibit K.

The entire text of the charges against Brakeman Price and his subsequent removal from service are indicative of unjust discrimination against one employee, and we earnestly request that your Honorable Board so declare by rendering an affirmative award in this case.

It is affirmed that all data submitted herein in support of our position has heretofore been presented to the representative of the carrier, and is hereby made a part of the question in dispute.

Oral hearing is waived unless requested by representatives of the carrier.

Brotherhood of Railroad Trainmen,
Union Pacific Railroad Company,
(South Central District),
By .....
L. E. Foley,
General Chairman.

EMPLOYEES' EXHIBIT A

Investigation and hearing conducted in office of Assistant Superintendent, Las Vegas, Nevada, with Brakeman L. L. Price, in connection with his failure to protect his assignment as Swing Brakeman at Nipton, Calif., on July 12th, 1949, and deadheading from Nipton to Las Vegas without proper authority, constituting violation of Operating Rules 700 and 702; investigation convened at 10:00 A.M., July 17th, 1949, but postponed at request of Brakeman Price until 9:30 A.M., July 18th, 1949; further postponed until 2:30 P.M., July 18th, 1949, to permit Brakeman Price to secure representation.

Present: W. B. Groome, Asst. Supt.; N. D. Nelson, Trainmaster.

Witnesses: L. L. Price, Brakeman; R. L. Gundy, Asst. Chief Dispr.; G. J. Wilde, Asst. Chief Dispr.; L. L. Rose, CTC Dispatcher; A. L. Dixon, Chief Crew Dispr.; S. M. Smith, Chief Clerk to Asst. Supt.

Reported by: S. M. Smith, Chief Clerk to Asst. Supt.

Exhibit A—(Continued)

Questions by Mr. Groome:

Statements by Mr. Price:

Q. Mr. Price, your notice of investigation and hearing, dated Las Vegas, July 16th, 1949, reads as follows:

"Please report at the office of the Assistant Superintendent, in the depot building, Las Vegas, Nev., on July 17th, 1949, at 10:00 A.M., for investigation and hearing on charges that you refused to protect your assignment as Swing Brakeman at Nipton, Calif., on July 12th, 1949, and deadheaded from Nipton to Las Vegas, Nev., without authority, constituting violation of Operating Rule 700, specifically, insubordination, and Operating Rule 702, specifically, failure to comply with instructions from proper authority and absenting yourself from duty without proper authority.

"The investigation and hearing will be conducted in conformity with the provisions of Article 33 of the agreement effective April 1st, 1943, between the Company and the ORC-BofRT, and you are entitled to representation as provided in that Article.

"You will be withheld from service pending the outcome of this investigation and hearing.

"You may produce such witnesses as you may desire, at your expense.

"Signed: W. B. Groome, Asst. Supt."

Mr. Price, was this notice of investigation and hearing received by you within the time provided in your schedule?

A. Yes, sir.

Exhibit A—(Continued)

Q. Do you desire representation?

A. I do.

Q. Is your representative present?

A. No, sir.

Q. Is it your desire to request postponement of this investigation until you produce your representative? A. It is.

Q. The investigation is postponed until 9:30 A.M., July 18th, 1949, and it will be necessary for you to sign Form "C" requesting postponement of the investigation until that time.

I have read the above and it is correct:

/s/ L. L. Price,
Brakeman.

Transcript correct:

/s/ S. M. Smith,
Chief Clerk to Asst. Supt.

(Investigation recessed at 10:15 A.M., July 17th, 1949.)

(Investigation reconvened at 2:30 P.M., July 18th, 1949, with Brakeman L. L. Price in absentia.)

Mr. Groome:

On July 16th, 1949, the following notice of hearing was issued to L. L. Price, Brakeman, Las Vegas, Nevada, reading as follows:

"Please report at the office of the Assistant Superintendent, in the depot building, Las Vegas, Nev., on July 17th, 1949, at 10:00 A.M., for investigation and hearing on charges that you refused to protect your assignment as Swing Brakeman at

Exhibit A—(Continued)

Nipton, Calif., on July 12th, 1949, and deadheaded from Nipton to Las Vegas, Nev., without authority, constituting violation of Operating Rule 700, specifically, insubordination, and Operating Rule 702, specifically, failure to comply with instructions from proper authority and absenting yourself from duty without proper authority.

"The investigation and hearing will be conducted in conformity with the provisions of Article 33 of the agreement effective April 1st, 1943, between the Company and the ORC-BofRT, and you are entitled to representation as provided in that Article.

"You will be withheld from service pending the outcome of this investigation and hearing.

"You may produce such witnesses as you may desire, at your expense.

"Signed: W. B. Groome, Asst. Supt."

On July 17th, 1949, the following consent to postponement, addressed to W. B. Groome, Asst. Superintendent, Las Vegas, Nev., was signed by Brakeman L. L. Price, reading as follows:

"Please refer to the notice of investigation and hearing which you sent to me under date of July 16th, 1949.

"I hereby consent to the postponement of this investigation and hearing until July 18th, 1949, commencing at 9:30 A.M., and agree that such postponement shall not affect the validity of such hearing in any way.

"Signed: L. L. Price, Brakeman."

Exhibit A—(Continued)

Questions by Mr. Groome:

Statements by Mr. Smith:

Q. Mr. Smith, you have been called as a carrier witness in this investigation. Will you state your name and occupation?

A. S. M. Smith, Chief Clerk to Asst. Superintendent, Las Vegas.

Q. Did Brakeman L. L. Price request a further postponement of the investigation, which had been postponed at his request until 9:30 A.M. today?

A. Yes, sir.

Q. What was his reason for asking for a further postponement?

A. He claimed that Mr. E. C. Grounds, his representative, was in Milford, Utah, and he did not desire to have the investigation until Grounds' return.

Q. Was he advised that the investigation would be deferred until 2:30 P.M. today for him to get some other representative? A. Yes, sir.

Q. Did Brakeman Price show up at 2:30 P.M.?

A. No, sir.

Q. Did he hand you the following letter, addressed to Mr. W. B. Groome, dated Las Vegas, July 18th, 1949, reading as follows:

"Referring to notice of investigation originally set for 10:00 A.M., July 17th, and postponed at my request until 9:30 A.M., July 18th:

"I hereby request further postponement until my representative, Mr. E. C. Grounds, is in Las Vegas.

"Signed: L. L. Price."

Exhibit A—(Continued)

A. Yes, sir. He asked me to write that letter for him.

I have read the above and it is correct:

/s/ S. M. Smith,
Chief Clerk to Asst. Supt.

Mr. Groome:

In view of the fact that Brakeman Price has not appeared at 2:30 P.M., as directed by me, the investigation and hearing will proceed with Brakeman Price in absentia.

Questions by Mr. Groome:

Statements by Mr. Rose:

Q. Mr. Rose, you have been called as a witness for the carrier in this particular case. Please state your name and occupation.

A. L. L. Rose, Train Dispatcher, Las Vegas.

Q. Were you working as the CTC Train Dispatcher between Las Vegas and Yermo on July 12th, 1949? A. Yes, sir.

Q. Do you recall the case of Brakeman L. L. Price being deadheaded on train No. 37 for swing brakeman service to Nipton, Calif., on that date?

A. Yes, sir.

Q. Are brakemen required by Superintendent's Circular instructions to contact the train dispatcher after arriving at Nipton? A. Yes, sir.

Q. Did Brakeman Price contact you after arriving at Nipton on No. 37 July 12th?

A. Yes, sir.

Q. What instructions did you give him?

Exhibit A—(Continued)

A. I instructed Brakeman Price to protect X 1622 E, which would arrive Nipton about 4:00 A.M., but told him to call in at 3:20 A.M. so that if the DLS train arrived Nipton in time for X 1622 E the dispatcher on duty might deadhead him back to Las Vegas on No. 38.

Q. Did Brakeman Price comply with your instructions? A. No.

Q. What did he do?

A. Brakeman Price deadheaded to Las Vegas on X1623E.

Q. Do you recall what time X1623E was by Nipton? A. No, I don't.

Q. The report submitted by Asst. Chief Dispatcher Gundy is to the effect that No. 37, on which Swing Brakeman Price deadheaded to Nipton, arrived there at 10:25 P.M., and the MSF train, X1623E, arrived Nipton at 11:10 P.M. Is that approximately correct? A. That is about right.

Q. Did Brakeman Price take exception to the instructions you gave him? A. Yes.

Q. Briefly, what was the phone conversation you had with him, as you recall it?

A. Brakeman Price said there was no place to eat or sleep at Nipton, and that he was returning to Las Vegas on the first eastbound train.

Q. Did you have any further conversation with him? A. No.

Q. Did Asst. Chief Dispatcher, Mr. Gundy, then talk with him? A. Yes.

Exhibit A—(Continued)

Q. To your knowledge, did Brakeman Price return to Las Vegas on the MSF train? X 1623 E?

A. I have no way of knowing that.

Q. Did Brakeman Price make it plain to you he was returning to Las Vegas on the next eastbound train? A. Yes, sir.

Q. And you had previously advised him there was a possibility he would be deadheaded from Nipton to Las Vegas on No. 38? A. Yes, sir.

I Have Read The Above and It Is Correct:

/s/ L. L. Rose,
Train Dispatcher.

Transcript Correct:

/s/ S. M. Smith,
Chief Clerk to Asst. Supt.

Questions by Mr. Groome:

Statements by Mr. Dixon:

Q. Mr. Dixon, you have been called as a carrier witness in this particular case. Please state your name and occupation.

A. A. L. Dixon, Chief Crew Dispatcher, Las Vegas.

Q. Is the handling of train crews at Las Vegas, including swing brakemen, your responsibility?

A. Yes, sir.

Q. Do you have certain records which would give the movements of swing brakeman Price out of Las Vegas July 12th, 1949? A. Yes, sir.

Q. What do your records disclose as to Brakeman Price moving out of Las Vegas on that date?

Exhibit A—(Continued)

A. He was called to deadhead on Train 37, 9:15 P.M., July 12th, 1949, to Nipton, Calif., for swing service.

Q. Deadheading on No. 37, what would be his time on duty? A. 9:15 P.M.

Q. And do you have any other records in your office which would give the arrival time of Brakeman Price from Nipton? A. Yes, sir.

Q. What record do you have to indicate his arrival time?

A. We have the Extra Brakemen's Register of Arrival, which every extra brakeman is required to register on when they arrive Las Vegas.

Q. What is the purpose of having the extra brakemen register on this particular form.

A. So that they will be marked up on the board in the proper order, in accordance with their agreement.

Q. Is that the responsibility of the carrier, to see that brakemen are marked up in their proper order? A. Yes, sir.

Q. Is this sheet prepared on a daily basis?

A. Yes, sir.

Q. I hand you herewith a mimeographed form, "Extra Brakemen's Register of Arrival," for July 13th, 1949. Is Brakeman L. L. Price registered on that form? A. Yes, sir.

Q. What time is he shown as arriving Las Vegas? A. 12:35 A.M., deadhead, on X 1623 E.

Exhibit A—(Continued)

Questions by Mr. Groome:

Q. And the fact that Brakeman Price registered as arriving on X 1623 E, at 12:35 A.M., would that mean to you he had arrived on that particular train? A. Yes, sir.

Q. Is there any other item on your mimeographed form of the extra brakemen's register of arrival, July 13th, concerning Brakeman L. L. Price? A. No, sir.

Q. Is it apparent to you that the only train he arrived at Las Vegas on on July 13th, 1949, was X 1623 E, at 12:35 A.M.? A. Yes, sir.

Q. Are you familiar with Form 2639, commonly known as conductor's train book? A. Yes, sir.

Q. I hand you herewith train book of Conductor W. E. Montgomery, covering his trip from Yermo to Las Vegas on July 13th, 1949, with X 1622 E, departing from Yermo at 1:40 A.M. and arriving Las Vegas 9:05 A.M., July 13th. Will you state for the record, and from Conductor Montgomery's train book, the brakemen he had into Las Vegas?

A. Brakemen E. E. Spainhower, H. C. Jackson and G. E. White.

Q. Is there any record of Brakeman L. L. Price on that particular train? A. No, sir.

I Have Read The Above and It Is Correct:

/s/ A. L. Dixon,
Chief Crew Dispatcher.

Transcript Correct:

/s/ S. M. Smith,
Chief Clerk to Asst. Supt.

Exhibit A—(Continued)

Questions by Mr. Groome:

Statements by Mr. Smith:

Q. Mr. Smith, on my instructions did you contact the Timekeeping Bureau at Los Angeles and have them ascertain from the records of the Company on file at that point who was the Swing Brakeman, shown by Conductor L. T. Roberton, on X 1600 W, symbol 4-MLA-8, departing Las Vegas 1:15 A.M., July 13th, 1949? A. Yes, sir.

Q. Who was the Swing Brakeman shown by Conductor Roberton?

A. Brakeman G. E. White.

Questions by Mr. Groome:

Statements by Mr. Smith:

Q. And did you have them advise also who the Swing Brakeman was shown by Conductor W. E. Montgomery, on X 1622 E, from Nipton to Las Vegas, on that date?

A. Yes, sir. That was also Brakeman G. E. White.

Q. Did the Timekeeper secure this information from Form 5031, the time slips submitted by these two conductors?

A. Yes, sir. He told me to wait until he got their time slips.

Q. Did either time slip show any other brakeman in swing service between Las Vegas and Nipton, other than Brakeman G. E. White?

A. No, sir. Not according to the information given me.

Exhibit A—(Continued)

I Have Read The Above and It Is Correct:

/s/ S. M. Smith,
Chief Clerk to Asst. Supt.

Transcript Correct:

/s/ S. M. Smith,
Chief Clerk to Asst. Supt.

Questions by Mr. Groome:

Statements by Mr. Dixon:

Q. Mr. Dixon, do you have any record to show the last arrival and departure time of Mr. E. C. Grounds, who was desired by Brakeman Price as his representative? A. Yes, sir.

Q. Would you state when he arrived at Las Vegas on July 16th, 1949?

A. At 7:50 P.M., July 16th.

Q. And departed when?

A. 8:00 P.M., July 17th.

Q. Was Mr. Grounds rested at 10:00 A.M., July 17th? A. Yes, sir.

I Have Read The Above and It Is Correct:

/s/ A. L. DIXON,
Chief Crew Dispatcher.

Questions by Mr. Groome:

Statements by Mr. Smith:

Q. Mr. Smith, did Mr. Price volunteer any information to you as to why he did not have his representative at 10:00 A.M., July 17th, for the investigation as it has been stated by Chief Crew Dispatcher Dixon his representative was in town?

Exhibit A—(Continued)

Questions by Mr. Groome:

Statements by Mr. Smith:

A. He stated the reason he wanted the investigation postponed until July 18th was because his witness, Brakeman L. L. Cook, was called for 10:00 A.M., July 17th, and he didn't want to have to pay him for laying off to attend the investigation as his witness.

I have Read The Above and It Is Correct:

/s/ S. M. Smith,

Chief Clerk to Asst. Supt.

Questions by Mr. Nelson:

Statements by Mr. Wilde:

Q. Mr. Wilde, you have been called as a carrier witness in connection with this case. Please state your name and occupation.

A. George J. Wilde, Train Dispatcher.

Q. Were you Asst. Chief Dispatcher, on duty Las Vegas 11:30 P.M., July 12th, to 7:30 A.M., July 13th, 1949? A. Yes, sir.

Q. And during your tour of duty on those dates did you have conversation with Brakeman L. L. Price? A. I did.

Q. About what time was this, Mr. Wilde?

A. Shortly after midnight, July 13th.

Q. What conversation did you have with Brakeman Price?

A. First of all he said, this is Brakeman Price. He said, I came into Las Vegas to eat. Do you

Exhibit A—(Continued)

want me to go back out on this MLA to protect the UX connection at Nipton.

Q. Was this on the phone, or personal contact?

A. On the telephone.

Q. Do you know where he was calling from?

A. Not definitely.

Q. You assumed him to be calling from the yard office?

A. From the Crew Dispatcher's office.

Q. Did he inform you he had arrived Las Vegas from Nipton, or did he tell you how he had arrived here? A. He didn't tell me how.

Q. Did he give you any particulars at all?

A. No, sir. He said he came into Las Vegas to eat.

Q. Had you been informed by the afternoon Asst. Chief Dispatcher, whom you relieved at 11:30 P.M., of the performance of Brakeman L. L. Price at Nipton? A. Yes, sir.

Q. It was your understanding that he returned deadhead from Nipton on the MSF train, leaving there about 11:10 P.M. and arriving Las Vegas shortly after midnight? A. Yes, sir.

Q. You instructed him he definitely was not to return to Nipton?

A. That is right. I told him exactly, it would not be necessary.

Q. You made it very plain to him?

A. Yes, sir.

Q. Was he arbitrary with you on the phone?

A. No, sir.

Exhibit A—(Continued)

Q. Did he tell you on the phone why he left Nipton?

A. No, sir. Other than that he came to Las Vegas to eat.

I Have Read The Above and It Is Correct:

/s/ G. J. Wilde,
Train Dispatcher.

Transcript Correct:

/s/ S. M. Smith,
Chief Clerk to Asst. Supt.

Questions by Mr. Nelson:

Statements by Mr. Gundy:

Q. Mr. Gundy, you have been called as a carrier witness in this investigation. Please state your name and occupation.

A. Richard L. Gundy, Asst. Chief Dispatcher.

Q. Were you Asst. Chief Dispatcher at Las Vegas July 12th, 1949, from 3:30 P.M. to 11:30 P.M.? A. Yes, sir.

Q. During those hours did you instruct that a swing brakeman be deadheaded on train No. 37 to Nipton, Calif., for swing service? A. I did.

Q. And was Brakeman L. L. Price called for this assignment? A. Yes, sir.

Q. Did he make the trip Las Vegas to Nipton on train 37? A. Yes, sir.

Q. Arriving there about 10:25 P.M.?

A. Yes, sir.

Q. On arrival at Nipton did he contact Train Dispatcher Rose? A. Yes, sir.

Exhibit A—(Continued)

Q. Did you have a phone conversation with Brakeman Price from Nipton?

A. Yes. After Price came back from trying to find some place to eat and told the Dispatcher he was coming back from Nipton to Las Vegas.

Q. What were Train Dispatcher Rose's instructions to Brakeman Price at Nipton on his arrival there?

A. That he protect a train arriving Nipton about—I believe it was 4:00 A.M.

Q. He was not released? A. No.

Q. Did he give Train Dispatcher Rose some argument?

A. Yes. He told him someone had to call him. He wanted an hour and a half call.

Q. But he was instructed by Train Dispatcher Rose to remain there and protect the UX, to arrive there approximately 4:00 A.M.? A. Yes.

Q. Did you talk with Brakeman Price on the phone after Dispatcher Rose had talked with him?

A. I did. I told Price if I were him I would protect the train and handle any grievance through his organization, as it should be handled.

Q. How did Brakeman Price reply to you?

A. I think he said, "Thank you, but I am going back to Las Vegas on the first train account no place to eat here."

Q. Did you give him positive instructions to remain there and protect the UX?

A. I told him that was his assignment, to pro-

Exhibit A—(Continued)

tect the UX, and if I were him I would not come back to Las Vegas and leave it unprotected.

Q. And you did not relieve him to return from Nipton to Las Vegas on the MSF?

A. No, sir.

Q. Do you know whether he came in on the MSF or not?

A. No. I don't. I wouldn't say whether he did or whether he protected the UX, because after I went home I didn't pay any more attention to it.

Q. You had no further conversation with Brakeman Price?

A. No, sir. I went home shortly after that.

Q. Is there any other information you have, Mr. Gundy, that might have any bearing on this case?

A. No. I think not. That is about all the conversation I had with him.

Q. Brakeman Price, then, did not comply with your instructions at Nipton?

A. As far as I know, he did not.

I Have Read The Above and It Is Correct:

/s/ R. L. GUNDY,
Asst. Chief Dispatcher.

Transcript Correct:

/s/ S. M. Smith,
Chief Clerk to Asst. Supt.

Mr. Groome:

As Brakeman Price, with his representative, did not appear at this investigation as directed there

Exhibit A—(Continued)

is no one present to present evidence or witnesses on his behalf. The investigation is closed. The evidence will be transcribed and carefully considered and Brakeman Price will be advised of the result of the investigation in due course.

Transcript Correct:

/s/ S. M. Smith,
Chief Clerk to Asst. Supt.

[Note: Exhibit B "Notice of Hearing" is set out at pages 14-15. Exhibit C "Consent to Postponement" at page 15 and Exhibit D "Request For Further Postponement" at page 16.

EMPLOYEES' EXHIBIT E

March 27, 1950

File No. 7-P-37
Mr. F. C. Paulsen
General Manager
Union Pacific Railroad Company
10 South Main Street
Salt Lake City 1, Utah

Re: Brakeman L. L. Price—request for reinstatement with all rights unimpaired and pay for time lost subsequent to July 13, 1949.

Dear Sir:

Decision of Superintendent D. F. Wengert, file No. PR-41949, being unsatisfactory, appeal is hereby taken.

Statement of Facts:

On July 16, 1949, Brakeman L. L. Price, regularly assigned to the brakemen's extra board at Las Vegas, Nevada, received notice to appear at the office of the assistant superintendent at Las Vegas, Nevada, at 10:00 A.M. on July 17, 1949, for an investigation on charges that he (Brakeman Price) refused to protect an assignment as swing brakeman at Nipton, California, on July 12, 1949, etc. On July 17, 1949, Brakeman Price consented to a postponement of the investigation until 9:30 A.M. on July 18. On July 18, 1949, Brakeman Price notified the assistant superintendent that the representative of his choice (B.R.T. Local Chairman E. C. Grounds) was engaged in making a trip from Las Vegas, Nevada, to Milford, Utah, and return in the services of the Union Pacific Railroad Company, and Brakeman Price requested that the above referred to investigation be postponed until such time as the representative of his choice (B.R.T. Local Chairman E. C. Grounds) was available. On July 24, 1949, Brakeman Price was notified that he was discharged from the service of the Union Pacific Railroad Company. Brakeman Price was withheld from service from July 13, 1949. Brakeman Price was present at the office of the assistant superintendent at 10:00 A.M. on July 17 and at 9:30 A.M. on July 18, 1949.

Position of Committee

Paragraph (a) of Article 33 of the agreement ef-

fective April 1, 1943, under which Brakeman L. L. Price was employed, reads in part as follows:

> "When a trainman is suspended for an alleged fault, no punishment will be fixed without a thorough investigation, at which the accused may have a trainman of his choice present." (Underscores added.)

The intent and purpose of the removal from service of Brakeman Price without affording him a thorough investigation and an opportunity to have present a trainman of his choice is as yet not clear to this committee. However, the above facts reveal conclusively that Brakeman Price was removed from service without recourse, without a thorough investigation, without an opportunity to secure the representative of his choice, and without regard for the provisions of the agreement under which he is employed, and this is obviously not consistent with the normal procedure used on this property in securing facts which would sustain the alleged charges.

The removal of a trainman from service in this manner is indicative of the desire of the representatives of the carrier to disregard that portion of the agreement covering investigations in its entirety. Such action, in our opinion, is comparable to Kangaroo Court persecution. That cannot be condoned by this committee, and you are hereby requested to reinstate Brakeman L. L. Price immediately with all rights unimpaired and to reimburse him for any and all losses in earnings that may have accrued

as a result of these above referred to actions on the part of the carrier's representatives.

I shall appreciate your investigation, advising.

Very truly yours,

L. E. Foley,
General Chairman—BRT.

LEF:dl
cc: Mr. L. L. Price
Mr. E. C. Grounds
Mr. E. R. Johnson

EMPLOYEES' EXHIBIT "F"

Union Pacific Railroad Company
Department of Operation

At Milford, Utah
March 30, 1950

911.221

Mr. L. E. Foley
General Chairman, BRT
225 Bartlett Building
215 West Seventh St.
Los Angeles 14, Calif.

Dear Sir:

Referring to your letter of March 27, file 7-P-37, regarding the case of Brakeman L. L. Price, requesting reinstatement with all rights unimpaired and pay for all time lost subsequent to July 13, 1949:

Brakeman Price was dismissed from service for

refusing to protect his assignment as swing brakeman at Nipton, California, on July 12, 1949, and deadheaded from Nipton to Las Vegas, Nevada without authority, constituting violation of Operating Rule 702. The violation for which Brakeman Price was dismissed was a serious one. He apparently had no sense of responsibility, and investigation was held covering his violation and the only reason he did not participate in that investigation is because he elected not to, as he was given every opportunity to do so.

If there is any merit to your claim, it is not understood why you elected to delay your request for a period of over eight months for his reinstatement on the basis outlined. There is possibly a reason for so handling; if there is, I shall be glad to receive advice as to what it is, as I have met with you in conference a number of times since the occurrence.

Believing the discipline has had the desired effect, I am agreeable to return Brakeman Price to service on a leniency basis.

Yours Truly,

/s/ F. C. Paulsen.

EMPLOYEES' EXHIBIT "G"

April 5, 1950

File 7-P-37

Mr. F. C. Paulsen
General Manager
Union Pacific Railroad Company
10 South Main Street
Salt Lake City 1, Utah

Re: Brakeman L. L. Price—request for reinstatement with all rights unimpaired and pay for time lost subsequent to July 13, 1949.

Dear Sir:

This will acknowledge receipt of yours of March 30, 1950, your file 011.221, with reference to the above captioned case, the second paragraph of which sets forth your reasons for the dismissal of Brakeman Price. However, it does not explain why a so-called investigation was conducted without affording Brakeman Price an opportunity to secure a representative of his choice.

The third paragraph of your letter indicates possible exceptions being taken to the delay in the handling of this case. If there is no merit to our claim, I am at a loss to understand what difference any delay connected therewith would make.

Notwithstanding these differences, this will advise that this committee cannot accept your proffer to reinstate Brakeman Price on a leniency basis and the case will be docketed for discussion in our next conference.

Very truly yours,

L. E. Foley,
General Chairman—BRT.

LEF:dl
cc: Mr. J. O. Blackford
Mr. E. R. Johnson

EMPLOYEES' EXHIBIT "H"

Union Pacific Railroad Company
Department of Operation

Salt Lake City 1, Utah
May 22, 1950

O11.221

Mr. L. E. Foley
General Chairman, BRT
1129 Bartlett Building
215 West Seventh St.
Los Angeles 14, Calif.

Dear Sir:

Referring to my letter of March 30, File 011.221, and our conference today relative to the case of Brakeman L. L. Price whose reinstatement you request with all rights unimpaired and pay for all time lost subsequent to July 13, 1949:

As stated to you in conference, Brakeman Price automatically severed his relationship with the Company when he walked off his assignment. It was my thought the discipline assessed would have the desired effect and I agreed to return Brakeman

Price to service on a leniency basis. I am not in a position to accede to your request that he be paid for all time lost. To do so would indicate I was agreeable to permitting employes to perform as they saw fit, regardless of how it affected the operation or welfare of the organization as a whole.

Yours truly,

/s/ F. C. Paulsen.

EMPLOYEES' EXHIBIT "I"

May 31, 1950

File No. 7-P-37

Mr. F. C. Paulsen
General Manager
Union Pacific Railroad Company
10 South Main Street
Salt Lake City 1, Utah

Re: Brakeman L. L. Price—request for reinstatement with all rights unimpaired and pay for time lost subequent to July 13, 1949.

Dear Sir:

Your letter of May 22, 1950, your file 011.221, setting forth your position relative to the above captioned case after our discussion while in conference in Salt Lake City on May 22, is not acceptable. The committee's contention, as set forth in our letter of March 27, 1950, that Brakeman Price was removed from service without a proper and thorough investigation provided for in Article 33

of the agreement effective April 1, 1943, has not changed.

You are, therefore, hereby requested to join us in a submission of this case to the First Division of the National Railroad Adjustment Board and to fix a date, time, and place for our meeting in an effort to agree upon a joint statement of facts in connection therewith.

Very truly yours,

L. E. Foley,
General Chairman—BRT.

LEF:dl
cc: Mr. J. O. Blackford
Mr. E. R. Johnson

EMPLOYEES EXHIBIT "J"

Union Pacific Railroad Company
Department of Operation
Salt Lake City 1, Utah
July 5, 1950

011.221

Mr. L. E. Foley
General Chairman, BRT
1129 Bartlett Building
Los Angeles 14, California

Dear Sir:

Your letter May 31st, file 7-P-37, captioned as follows:

"Brakeman L. L. Price—request for reinstate-

ment with all rights unimpaired and pay for time lost subsequent to July 13, 1949."

In conference held at Los Angeles, June 30, 1950, we were unable to agree upon a Joint Statement of Facts in this case, and I understand it will be submitted to the First Division, NRAB, by the employes ex parte.

Yours truly,

/s/ F. C. Paulsen.

EMPLOYEES' EXHIBIT "K"

National Mediation Board
Washington

Mediation Agreement—Union Pacific Railroad Company (South-Central District) (Carrier) and Brotherhood of Railroad Trainmen (Organization)

In settlement of differences as set forth in an application for mediation as described in Docket Case No. 3172, dated July 6, 1949, of the National Mediation Board and under the provisions of the Railway Labor Act, amended on June 24, 1934, it is mutually agreed that the question so submitted by the said Brotherhood of Railroad Trainmen to the said Union Pacific Railroad Company, South Central District, is hereby disposed of in the form of an agreement, a copy of which is attached hereto but not made a part hereof, as follows:

"Agreement dated July 15, 1949, providing for

establishment of away from home terminal for swing brakemen at Kelso, California, and related issues in connection therewith."

The above constitutes full and complete settlement of issues involved.

Signed at Salt Lake City, Utah, this 15th day of July, 1949.

For The Carrier:

/s/ By F. C. Paulsen,
General Manager.

For The Employees Represented by The Brotherhood of Railroad Trainmen:

/s/ By D. A. MacKenzie,
Asst. President.

[Seal]

Witness:

/s/ James L. Haloren,
Mediator, National Mediation Board.

Swing Brakemen

It is agreed:

1. This agreement applies to brakemen in excess of two (hereafter referred to as swing brakemen) used on through freight trains between Las Vegas, Nevada and Kelso, California, in accordance with applicable provisions of State Laws.

2. Las Vegas, Nevada is established as the home terminal and Kelso, California the away from home terminal for swing brakemen covered by this agreement.

3. Swing brakemen working between Las Vegas, Nevada and Kelso, California, shall work and be paid in accordance with existing rules and regulations applicable to them, except as provided in Sections 4, 5 and 6, hereof.

4. (a) For application only to swing brakemen where Kelso is the away from home terminal, held away from home terminal time shall be paid in accordance with Article 14, Section (a) of the agreement effective April 1, 1943, as revised by the National Agreement dated at Chicago, November 14, 1947 and effective January 1, 1948, except that in the first 24-hour period, pay for held away from home terminal time shall start to accrue at the expiration of 12 instead of 16 hours and no allowance shall be paid for the 20th to 24th hours, inclusive. Article 14(a) shall otherwise apply.

(b) This variation in the application of the held away from home terminal time rules shall apply only to swing brakemen and shall not constitute a precedent in the application of the rules nor be cited by the employes hereafter as a basis for requesting the same consideration for any other employes.

5. Under this agreement, swing brakemen shall be used from the brakemen's extra board at Las Vegas, Nevada, working first-in first-out in conjunction with other brakemen on that extra board. This swing brakemen service shall be considered unassigned service and the daily guarantee pro-

vided for in Article 32(a) of the schedule agreement shall not apply.

6. Under this agreement, when no swing brakemen are available at Kelso, it shall be permissible to transfer a swing brakeman from a train moving in one direction to a train moving in an opposite direction at the meeting point of the two trains, or a station reasonably close, in which event swing brakemen shall be paid on a turnaround basis calculated from time of reporting for duty at the initial terminal station until released from duty at that station.

7. Nothing herein shall be construed as superseding any provision of existing agreement except as specifically provided herein.

8. This agreement shall be effective July 18th, 1949, and shall terminate thirty days after written notice served by either party upon the other.

Union Pacific Railroad Company,

/s/ By F. C. Paulsen,
General Manager.

Brotherhood of Railroad Trainmen,

/s/ By L. E. Foley,
General Chairman,

/s/ By D. A. MacKenzie,
Asst. President.

Salt Lake City, Utah, July 15, 1949.

National Railroad Adjustment Board
First Division

April 10, 1951

Docket No. 27393

Parties to dispute Brotherhood of Railroad Trainmen vs. Union Pacific Company (South-Central District)

EMPLOYEES' REBUTTAL TO CARRIER'S SUBMISSION

Statement of Claim: Claim for restoration to service with all rights unimpaired and for pay for all time lost for Brakeman L. L. Price since July 13, 1949.

Employees' Rebuttal to Carrier's Submission: That portion of the carrier's statement of facts reading as follows:

> "Prior to July 12, 1949 and subsequent thereto, the third brakeman required on freight trains under Nevada law was called from the brakemen's extra board. The brakeman accompanied the train westward from Las Vegas, Nevada to Nipton, California, left the train at the latter point and then accompanied an eastbound train from Nipton, California to Las Vegas, Nevada as directed by the train dispatcher."

while briefly explained on pages 20 and 21 of the carrier's submission, is somewhat misleading as the language "prior to July 12, 1949" indicates an indefinite prior period when the facts are that swing

brakemen had been required to detrain at Nipton, California, only subsequent to June 27, 1949, as will be noted on page 3 of the carrier's submission (see date of Superintendent's Circular No. 77). This action was vigorously protested by the employees as will be noted by the fact that the services of the National Mediation Board were requested on the basis of the carrier's disregard for section (b) of Article 32 reading as follows:

"Swing brakemen will not be tied up nor released at points where sleeping and eating accommodations are not available."

For some months prior to June 27, 1949, swing brakemen had been detrained at Kelso, California, where eating and sleeping accommodations were available. This method of handling swing brakemen was restored on July 15, 1950, with the conclusion of Mediation Agreement 3172 (Employees' Exhibit K).

The carrier's complaint that the employees did not assert that the claimant was not guilty of rule violations as charged appears to be far reaching. Assuming that under the agreement the employee's guilt should be established by a fair hearing in accordance with the provisions of the agreement, no employee is guilty until such time as reasonable evidence sustaining the charges has been heard, and without such an investigation, it appears obvious that the guilt of the claimant in this case was not established and that such an assertion from the employees would have served only to reiterate an obvious, reasonable fact.

The carrier lays heavy stress upon the alleged charges that the claimant refused to protect his assignment and refused to obey instructions, asserting that the claimant was instructed to deadhead from Las Vegas to Nipton and to perform service as a swing brakeman on extra 1622 east from Nipton to Las Vegas. The employees contend that the claimant did precisely as instructed. He deadheaded to Nipton and returned to Las Vegas for food after receiving instructions that the train on which he was to swing from Nipton to Las Vegas would not arrive at Nipton until approximately 4:00 a.m. on the following morning. He was ready and willing to fulfill his assignment by returning to Nipton on a freight train known as symbol MLA. Such is again in support of the employees' contention established in the so-called transcript of investigation as indicated on pages 9 and 10 of Employees' Exhibit A in the following questions and answers:

"What conversation did you have with Brakeman Price?

A. First of all he said, this is Brakeman Price. He said, I came into Las Vegas to eat. Do you want me to go back out on this MLA to protect the UX connection at Nipton."

"Q. It was your understanding that he returned deadhead from Nipton on the MSF train, leaving there about 11:10 p.m. and arriving Las Vegas shortly after midnight?

A. Yes, sir.

"Q. You instructed him he definitely was not to return to Nipton?

A. That is right. I told him exactly, it would not be necessary."

"Q. You made it very plain to him?

A. Yes, sir."

"Q. Was he arbitrary with you on the phone?

A. No, sir."

It will be noted that the claimant registered in and tied up at Las Vegas only after he had been definitely instructed not to return to Nipton to perform services as swing brakeman on extra 1622 east. Consequently, the claimant did not refuse to do what he was told unless it could be construed that he did secure food when he was told not to; however, the record does not indicate definitely that he was instructed not to secure food. The record does indicate that he secured the food without in any way affecting the efficiency of his performance as instructed by the carrier.

The carrier insists that there were adequate eating and sleeping accommodations at Nipton, as indicated in their statement and on page 20 of their submission, reading as follows:

> "There were, of course, adequate eating and sleeping accommodations at Nipton, * * * "

The employees contend there were no eating accommodations at Nipton whatsoever between the hours of 8:00 p.m. and 6:00 a.m., and the carrier's operating officers were well aware of this fact. In support of the employees' contention, we insert herein

a copy of a notice dated July 2, 1949, and signed before a Notary Public. This notice was furnished to the local officers of the Brotherhood of Railroad Trainmen representing the brakeman involved and reads as follows:

"July 2, 1949
Nipton, Calif.

"Brotherhood of Railroad Trianmen
Las Vegas, Nev.

"To Whom It May Concern:

"This is notice that there will be no meals served at Nipton Hotel between the hours of 8:00 p.m. and 6:00 a.m. daily unless agreement is reached providing a minimum of $200.00 a month revenue from rooms and I will notify Brotherhood of Railroad Trainmen of such agreement."

(Original signed),
Mrs. J. N. Morrow.

[Seal] (Signed) Mozelle H. Purcell, Notary.
"My commission expires July 7, 1952."
"Witness"—(Signed) C. Purcell.

The carrier's exception to the employees' statement that it is questionable whether the services of Brakeman Price as swing brakeman were needed at all at Nipton on the date in question and that no other brakeman was sent from Las Vegas to protect the services originally intended for Brakeman Price, is also misleading. The carrier's assertion, "The reason Brakeman Price's services were not utilized for the services originally intended was be-

cause Brakeman Price refused to perform that service as instructed," is not supported by the evidence adduced in their own so-called investigation. The following statements support the contention of the employees:

> "Q. Mr. Smith, on my instructions did you contact the Timekeeping Bureau at Los Angeles and have them ascertain from the records of the Company on file at that point who was the Swing Brakeman, shown by Conductor L. T. Roberton, on X 1600 W, symbol 4-MLA-8, departing Las Vegas 1:15 a.m., July 13th, 1949?
>
> A. Yes, sir.
>
> "Q. Who was the Swing Brakeman shown by Conductor Roberton?
>
> A. Brakeman G. E. White.
>
> "Q. And did you have them advise also who the Swing Brakeman was shown by Conductor W. E. Montgomery, on X 1622 E, from Nipton to Las Vegas, on that date?
>
> A. Yes, sir. That was also Brakeman G. E. White."

It will be noted that Swing Brakeman White was used on extra 1600 west, symbol 4-MLA-8, departing from Las Vegas at 1:15 a.m., which was the one and same MLA on which the claimant was ready to return to Nipton, but he was instructed not to return on that train. Obviously the dispatcher knew that the claimant's services were not needed at Nipton as Brakeman White apparently arrived at Nipton well in advance of the time that it was

expected the claimant's services would be needed, as it is noted that Brakeman White was used on extra 1622 east from Nipton to Las Vegas, the train for which the claimant was originally deadheaded to Nipton's supposedly to protect from that point. This affirms the employees' statement that no other brakeman was sent from Las Vegas to protect the service intended for the claimant from Nipton. It apparently was not necessary to send an additional brakeman to Nipton in lieu of the claimant herein referred to. Consequently, the actions of the claimant, from an operational standpoint, were precisely what the operating officers of the railroad wanted. Had Brakeman Price not returned to Las Vegas for food, it would have been necessary for the carrier to have deadheaded some brakeman from Nipton to Las Vegas. The carrier's assertions in this event are indicative of their failure to comprehend the real situation involved in this particular instance, or they are not interested in presenting the real facts to your Honorable Board.

The carrier's indicated attempt to white-wash their method of conducting investigations without any consideration for the provisions of the agreement under which the claimant was working is evidenced by their assertion in that portion of the carrier's alleged to be unchallenged facts as noted in items 5 and 6 on page 10 of the carrier's submission, reading as follows:

> " * * * and instructed to appear for investigation and hearing at 10:00 a.m. July 17th, at the

office of the Assistant Superintendent at Las Vegas, Nevada.

"6. The Claimant appeared at the Assistant Superintendent's office as directed in the notice of charges, and after the investigation and hearing had started, he requested postponement for the purpose of obtaining a representative. Request for postponement was granted until 9:30 a.m. the following day, July 18th. On the following day, July 18th, the Claimant requested the investigation and hearing be indefinitely postponed."

and does not appear to be consistent with the evidence adduced at the carrier's so-called investigation over which they had full control without opposition. The statement of one, Mr. S. M. Smith, is disclosed on pages 8 and 9 of Employees' Exhibit A as follows:

"Q. Mr. Smith, did Mr. Price volunteer any information to you as to why he did not have his representative at 10:00 a.m., July 17th, for the investigation, as it has been stated by Chief Crew Dispatcher Dixon his representative was in town?

A. He stated the reason he wanted the investigation postponed until July 18th was because his witness, Brakeman L. L. Cook, was called for 10:00 a.m., July 17th, and he didn't want to have to pay him for laying off to attend the investigation as his witness."

The carrier would imply that the request for the

first postponement was for the purpose of securing a representative of the claimant's choice who was available on the date originally set for the investigation, when the facts are that the first postponement was definitely requested because of the fact that important witnesses, whom the claimant considered necessary to establish the facts regarding the charges against him, were not available on this particular day. The carrier's position that witnesses produced by the claimant would be at his expense most assuredly had some effect upon the claimant's endeavoring to have such witnesses present without being required to pay for the time they might lose. The carrier's assertion that the second postponement was requested for an indefinite period appears to be erroneous as the second postponement was requested until such time as the representative of the claimant's choice could be present, wherein the claimant named the Local Chairman of the Brotherhood of Railroad Trainman as his choice of representative. The carrier was well aware of the whereabouts of the Local Chairman and about when he would return and be available.

The carrier, in their attempts to justify their actions in this case, depends heavily upon the evidence adduced at their so-called investigation at which the employee or his representative had no opportunity to cross-examine witnesses or to introduce their own witnesses and it appears only reasonable that your Board should have the benefit of the written statement of the claimant in his request for the

services of his local lodge in handling his grievance, a copy of which follows:

"Las Vegas, Nevada
July 27, 1949

"Mr. Claude Thompson, Mr. E. C. Grounds, Death Valley Lodge No. 781, Las Vegas, Nevada.

"Gentlemen:

"Please accept this as a statement of facts pertaining to my discharge from the services of the Union Pacific Railroad and a request for Lodge action for my reinstatement with pay for all time lost and all seniority and all rights restored.

"Brakeman L. L. Price was called July 12, 1949, to deadhead on Train No. 37, Las Vegas, Nevada, to Nipton, California, as a swing brakeman.

"No. 37 departed from Las Vegas at 9:15 p.m., July 12th, arriving in Nipton, California at 10:30 p.m., July 12th.

"Brakeman Price, on arrival at Nipton, California, called the C.T.C. Dispatcher on the C.T.C. telephone as per instructions.

"The Dispatcher advised Brakeman Price that Extra 1622 East, the train he was to swing back to Las Vegas, Nevada, would not arrive at Nipton, California, until 4:30 a.m. or 5:00 a.m. July 13th, 1949.

"Brakeman Price advised the Dispatcher that there were no eating facilities open at Nipton, California, between the hours of 8:00 p.m. and 6:00 a.m., and that he would return to Las Vegas, Nevada, on

the first Las Vegas bound train, to obtain food.

"Brakeman L. L. Cook was head brakeman on Extra 1623 East, which train was then in the hole at Bryant for No. 37 and Brakeman Cook was endeavoring to communicate with the C.T.C. Dispatcher and heard the conversation between the C.T.C. Dispatcher and Brakeman Price and can verify the facts of this statement.

"Brakeman Murphy was called as swing man, Nipton, California to Las Vegas, Nevada, and was present at Nipton, California. He heard all statements made by Brakeman Price and can verify that Brakeman Price endeavored to buy food at the hotel in Nipton and was told by the management of the hotel that no food was available between the hours of 8:00 p.m. and 6:00 a.m. and that the management of the Nipton Hotel had notified the Union Pacific Railroad in writing, that no food was available for Union Pacific Railroad Brakeman between the hours of 8:00 p.m. and 6:00 a.m.

"Brakeman L. L. Price deadheaded from Nipton, California to Las Vegas, Nevada on Extra 1623 East arriving at Las Vegas at 12:35 a.m., July 13th.

"Brakeman Price obtained food and then advised the Chief C.T.C. Dispatcher by telephone at the Union Pacific Railroad Yard Office that he had obtained food and was ready and willing to return to Nipton, California, on the M.L.A. called to leave Las Vegas at 1:45 a.m., July 13th.

"The Chief Dispatcher advised Brakeman Price that he need not return to Nipton, California.

"Brakemen G. E. White, L. L. Cook, F. M. Murphy, R. P. Johnson and several others were present and can verify that Brakeman Price called the Chief Dispatcher and advised him of being ready and willing to return to Nipton on the M.L.A.

"After being told that he need not return to Nipton, Brakeman Price registered in and went home.

"Brakeman G. E. White, swing Brakeman on the M.L.A. arrived at Nipton at 4:00 a.m., July 13, and Extra 1622 East, the train Brakeman Price would have been used on had he been instructed by the Chief Dispatcher to return to Nipton, arrived at Nipton at 6:40 a.m. July 13th.

"Brakeman Price was held out of service on instruction of Assistant Superintendent W. B. Groome at 9:05 a.m. July 13th.

"Brakeman Price was notified at 7:00 p.m., July 16, to be present at hearing to be held at 10:00 a.m. July 17th.

"Brakeman Price was present at said hearing and requested and was granted a postponement until 9:30 a.m., July 18th, due to the fact that witnesses G. E. White and L. L. Cook were out of town on the Moapa Local.

"Brakeman Price was present at the office of Assistant Superintendent Groome at 9:30 a.m. July 18th, and requested postponement of the hearing until his representative, Mr. E. C. Grounds, was in Las Vegas.

"Assistant Superintendent Groome advised Brakeman Price that he could not grant further postponement of the hearing.

"Brake man Price requested Mr. Groome's Chief Clerk, Stan Smith, to type a written request of postponement and Stan Smith did so.

"Brakeman Price signed said request and handed it, in person, to Mr. Groome.

"Mr. Groome advised Brakeman Price verbally that unless Brakeman Price was advised otherwise, the hearing would be held at 2:30 p.m. July 18th.

"Brakeman Price received a letter from Superintendent Wengert on July 27th, 1949, advising him that he was discharged from the Company's service.

"Copies of said letter and others are attached hereto.

"Action on this matter is respectfully requested due to violation of Art. 33A of our current schedule, effective April 1, 1943.

"Respectfully yours,"
(Signed) L. L. Price

The employees further contend that the carrier disregarded the agreement under which they work and its application in regard to the controversy herein involved when they dismissed the claimant from the their service. In support of this contention, the employees offer the following indicated actions on the part of the carrier:

1. The carrier's attempt to establish a terminal in the middle of an established district without negotiations.

2. The carrier's attempt to detrain brakemen at a station en route without satisfactory eating and

sleeping facilities without regard to the provisions of the agreement.

3. The carrier's method of conducting the investigation.

4. The carrier's removal of the claimant from service in violation of the agreement under which he was employed.

To defend or support the carrier's position in this case would make it appear justifiable for a carrier to arbitrarily, without negotiation, change the working conditions of its employees in a manner that would subject them, without recourse, to exposure at a station en route in desert terrain infested with scorpions, rattlesnakes, and other insects of the desert, without even affording them an opportunity to obtain ice water, and, in the event employees object or endeavor to secure release from these conditions upon their own initiative, to remove them from service without any regard for the provisions of their agreement and, as in this particular case, without conducting a thorough investigation. The employees contend that such actions, as herein related, on the part of the carrier are indicative of retaliatory measures taken, on account of the employees seeking relief through the request of their organization for the services of the National Mediation Board, in discharging this claimant from the services of the company without any recourse.

The employees urgently request that your Board

give consideration to their contentions and sustain their position with an affirmative award.

Brotherhood of Railroad Trainmen, Union Pacific Railroad Company (South-Central District).

/s/ By L. E. FOLEY,
General Chairman.

Award 15509
Docket 27393

NATIONAL RAILROAD ADJUSTMENT BOARD

First Division

39 South La Salle Street, Chicago 3, Illinois
With Referee A. Langley Coffey

Parties to Dispute:

Brotherhood of Railroad Trainmen Union Pacific Railroad Company (South Central District).

Statement of Claim: "Claim for restoration with all rights unimpaired and for pay for all time lost for Brakeman L. L. Price since July 13, 1949."

Findings: The First Division of the National Adjustment Board, upon the whole record and all the evidence, finds that the parties herein are carrier and employe within the meaning of the Railway Labor Act, as amended, and that this Division has jurisdiction.

Hearing was waived.

If the carrier is to have efficient operations on its railroad, employes must be relied on to obey operating instructions and orders. Claimant was found to have wilfully disobeyed his orders. This was insubordination and merited discipline.

The employe has been tendered reinstatement on a leniency basis but seeks complete vindication on the grounds that he was denied the investigation provided by the rules of agreement. Thus, the only question for review is whether there was substantial compliance with the investigation rule.

Basically, the complaint is that the hearing was held when the claimant was not present.

The transcript of the hearing shows that at the appointed time and place the employe appeared without a representative. On the carrier being acquainted with the employe's desire to have his representative present and for no other reason assigned by the employe at the time, the hearing was postponed until the following morning by mutual consent. Neither the employe nor his representative appeared the next morning but the employe made written request for additional time "until my representative Mr. E. C. Grounds is in Las Vegas". The hearing was passed to the afternoon of the same day and claimant was notified to appear and be ready to proceed at that time. When he failed to appear the hearing was held in his absence.

The transcript shows that on the date when the hearing was originally set the employe's chosen

representative was off duty and as far as we know was in Las Vegas. No reason is assigned for his failure to appear, but his presence would have obviated the need of any postponement for the reason assigned. The employe, in connection with his request for further delay, told an officer of the carrier he did not want to proceed with the hearing on the first day because he would have been compelled to pay a material witness for time lost in order to have him present; that since the witness was scheduled to be off the next day he sought to avoid this expense by asking for the first postponement. We are left to speculate what would have happened if on the day following the hearing the witness was again on duty but the chosen representative was in from his assigned run.

It must be understood that there is no greater sanctity in the investigation rule than any other on the property. All rules are for the aid, guidance, and protection of responsible persons. The right of the employe to be heard before being disciplined is a personal right which he can waive by action, inaction, or failure to act in good faith. He cannot play fast and loose with the rule and expect its strict observance by others who too are accountable for failure to act promptly, justly, and in good faith.

It would have been more to the employe's credit if he had been forthright in the reason assigned for wanting the hearing delayed the first time. Also, his position here would have been strengthened had he personally appeared at all stages of the proceeding

to labor as best he could to preserve his record and to get his story to us first hand. All that the transcript reflects does claimant no credit, but leaves us with the feeling that the things of which he now complains were planned by him that way.

Award: Claim denied.

National Railroad Adjustment Board. By Order of First Division.

Attest:

/s/ (Signed) J. M. MacLeod,
Executive Secretary.

Dated at Chicago, Illinois, this 25th day of June, 1952.

[Endorsed]: Filed July 12, 1955.

[Title of District Court and Cause.]

AFFIDAVIT

State of Nebraska,
County of Douglas—ss.

A. J. VanDercreek, being first duly sworn, deposes and says:

My name is A. J. VanDercreek and I am an Assistant Vice president in the Department of Labor Relations of the Union Pacific Railroad Company with offices at Omaha, Nebraska. In such capacity I am an assistant to Mr. E. J. Connors who is Vice President, Department of Labor Relations. I have personal knowledge of the facts set forth in this affidavit.

Under date of January 15, 1951, by letter bearing the date and addressed to Vice President E. J. Connors by regular U. S. Mail and received in the office of the Department of Labor Relations of the Union Pacific Railroad Company at Omaha, Nebraska, the latter was advised by Mr. T. S. McFarland, then Executive Secretary of the First Division of the National Railroad Adjustment Board, that Mr. L. E. Foley, General Chairman, Brotherhood of Railroad Trainmen, South-Central District of the Union Pacific Railroad Company, had submitted a dispute concerning the discharge of Brakeman L. L. Price to the National Railroad Adjustment Board. A true and correct copy of that letter is as follows:

"National Railroad Adjustment Board
First Division
39 South La Salle Street, Chicago 3, Illinois
January 15, 1951

"Mr. E. J. Connors, Vice President
Union Pacific Railroad Company—South
Central District
1416 Dodge Street
Omaha, Nebraska

Dear Sir: U:1040

"We have received from General Chairman L. E. Foley; one ex parte submission in claim for restoration to service of Brakeman L. L. Price as shown in his letter of the 11th instant.

It is our understanding that you were given a copy of the submission by Mr. Foley. Pursuant to

the provisions of Circular B of October 14, 1949, you are requested to file by February 14, 1951, fifteen copies of your answer to the employee's submission and to give the General Chairman a copy.

Yours very truly,

/s/ T. S. McFarland,
T. S. McFarland,
Executive Secretary.

TSM/pk

cc: Mr. W. P. Kennedy, Pres. BRT
Mr. L. E. Foley, GC-BRT
1129 Bartlett Bldg.
215 West Seventh Street
Los Angeles 14, Calif."

Under date of April 13, 1951, by letter bearing that date and addressed to Vice President E. J. Connors by regular U. S. Mail and received in the office of the Department of Labor Relations of the Union Pacific Railroad Company at Omaha, Nebraska, the latter was advised by Mr. T. S. McFarland, then Executive Secretary of the First Division of the National Railroad Adjustment Board, that the file of the First Division, National Railroad Adjustment Board, in the dispute concerning the discharge of Brakeman L. L. Price, had been completed, that the parties to that dispute had waived oral hearing and that First Division Docket number "27393" had been assigned to that dispute. A true and correct copy of that letter is as follows:

"National Railroad Adjustment Board
First Division
39 South La Salle Street, Chicago 3, Illinois
Telephone: Andover 3-1050

April 13, 1951

U-1040

"Mr. E. J. Connors, Vice President
Union Pacific Railroad Company
1416 Dodge Street
Omaha 2, Nebraska
Mr. W. P. Kennedy, President
Brotherhood of Railroad Trainmen
Standard Building
Cleveland 13, Ohio

Gentlemen:

"Our docket number has been assigned, as indicated, to the following Union Pacific Railroad Company and Brotherhood of Railroad Trainmen's case, which was submitted ex parte and which has been completed:

"27393—Claim for restoration to service with all rights unimpaired * * * July 13, 1949.

"The parties waived oral hearing.

Yours very truly,
/s/ T. S. McFarland,
T. S. McFarland,
Executive Secretary.

TSM/em
cc: Mr. L. E. Foley, General Chairman, BRT"

Under date of December 5, 1952, there was received in the office of the Department of Labor Re-

lations of the Union Pacific Railroad Company at Omaha, Nebraska, through regular U. S. Mail, a letter purporting to be signed by "L. L. Price, Brakeman, Las Vegas, Nevada" and addressed to Vice President E. J. Connors. A true and correct copy of that letter is as follows:

"1400 Lewis Ave.
Las Vegas, Nevada
5 December 1952

"Mr. E. J. Conners
Union Pacific Railroad
Omaha, Nebraska

R.E.: F. C. Paulsen File No. 011.221
Railroad Adjustment Board
Award 15509 Docket 27393

Dear Sir:

"I appeal to you at this time for your consideration of my claim for reinstatement with full pay for time lost subsequent to July 13, 1949 with all rights unimpaired.

"Investigation of the facts in the records of my case would reveal that there is merit in my request after my claim has been heard and denied by the Railroad Adjustment Board.

"May I present these facts, substantiated by records available to you, for your consideration?

"1) Nipton, Calif. was not suitable for a swing brakeman to be tied up or held away from home terminal between the hours of 8 P.M. and 6 A.M. on July 12, 1949.

"2) I notified the C.T.C. Dispatcher, from Nipton, that I was returning to Las Vegas, Nevada to obtain food.

"3) I offered to return to Nipton on the M.L.A. to protect my assignment on Extra 1622 East.

"4) Brakeman G. E. White, swingbrakeman on the M.L.A., called to leave Las Vegas at 1:45 A.M. July 13, worked back to Las Vegas as swing brakeman on Extra 1622 East, the train I had been deadheaded to Nipton, on No. 37, to protect.

"5) No. 37 arrived at Nipton, Calif. July 12, 1949 at 10:30 PM Extra 1622 East departed Nipton, Calif. July 13, 1949 at 6:40 AM.

"6) I was advised, by C.T.C. Dispatcher:

a) At Nipton;

'he had advised Mr. Groom that the swing brakeman would be at Nipton for about 8 hours without a place to eat if he were deadheaded on No. 37'

b) At Las Vegas;

'swing brakeman G. E. White would reach Nipton on the M.L.A. in plenty of time to protect Extra 1622 East at Nipton and that it was not necessary for me to return to Nipton'

"7) I was present at the designated time and place for the investigation when called and consented to a postponement to the following morning because my two witnesses were out of town on the Moapa Local.

"8) E. C. Grounds, at that time Local Chairman of the B. of R. T. was a sufficient number of 'times out' on the brakemans Extraboard that, in his opinion, 'he would be present as my representative the next morning.' He advised me that if he were not for me to 'request a postponement in writing until I am back in Las Vegas and ask White and Cook to layoff if they have to in order to be present at the investigation.'

"9) Grounds was in Milford, Utah in service of the Union Pacific Railroad as a brakeman, the following morning, July 18, 1949 I requested the postponement as per his instructions and my two witnesses White and Cook offered to layoff without pay until the investigation could be held as we were all concerned regarding the Nipton situation.

"10) The postponement, as I had requested, was refused and the investigation was held at 2:30 PM July 18, 1949 without me or anyone designated by me, being present.

"11) I was discharged as a result of that investigation.

"I ask your consideration of my claim at this time for two reasons:

"1) I was seriously injured in July 1944 in Union Pacific Railroad service and lost a year and ten days work at the peak of our earnings yet I settled my claim myself with our company for $4500.00 which was less than I would have earned had I been able to work and a great deal less than

I would have received had I resorted to legal means to settle my claim.

"2) I am now prepared and am filing suit in Federal Court Jan. 5, 1953 unless I am reinstated with full pay for time lost prior to that date.

"With respect and appreciation for your consideration of this matter.

/s/ L. L. Price,
Brakeman,
Las Vegas, Nevada."

On December 12, 1952, I addressed a letter to Mr. L. L. Price responding to his letter of December 5, 1952, addressed to Vice President Connors and quoted above. I signed Mr. Connors' name to that letter, being duly authorized so to do. A true and correct copy of the letter to Mr. Price, dated December 12, 1952, is as follows:

"Union Pacific Railroad Company
Omaha 2, Nebraska

E. J. Connors,
Vice President

December 12, 1952

011-221-P

"Mr. L. L. Price
1400 Lewis Avenue
Las Vegas, Nevada
Dear Sir:

"Your letter December 5th, appealing for consideration, your claim for reinstatement with full

pay for time lost subsequent to July 13, 1949, with all rights unimpaired.

"Your claim was submitted to the First Division of the National Railroad Adjustment Board under the provisions of the Railway Labor Act and denied by the Board in Award No. 15509.

"Mr. A. D. Hanson, General Manager, Salt Lake City, is the highest officer of appeal in discipline cases on the South-Central District, on which you were formerly employed.

Yours very truly,

/s/ E. J. Connors.

cc—Mr. A. D. Hanson
General Manager
Union Pacific Railroad Company
Salt Lake City, Utah"

The now deceased L. E. Foley was General Chairman of the Brotherhood of Railroad Trainmen on the South-Central District of the Union Pacific Railroad Company from February 24, 1947, to December 28, 1952, and in such capacity represented and handled grievances and other disputes under the provisions of the Railway Labor Act for employees of Union Pacific Railroad Company (South-Central District), including those employed as brakemen. Such handling included the prosecution of said grievances to the First Division of the National Railroad Adjustment Board. I have checked the records in my office and during the time Mr. L. E. Foley was General Chairman of the Brotherhood of Railroad Trainmen, he progressed approx-

imately 14 disputes or grievances to the First Division of the National Railroad Adjustment Board. Of this number, 3 were progressed to and handled before the said First Division prior to February, 1951.

/s/ A. J. VanDercreek.

State of Nebraska,
County of Douglas—ss.

Subscribed and sworn to before me, a Notary Public, this 8th day of May, 1956.

[Seal] /s/ Louis Scholnick.

My Commission expires May 10, 1960.

Acknowledgment of Service Attached.

[Endorsed]: Filed May 10, 1956.

[Title of District Court and Cause.]

ANSWER

First Defense

I.

Defendant admits all of the allegations in Paragraphs I, II, and III of Plaintiff's Complaint.

II.

Answering Paragraph IV of the Complaint, Defendant admits all of the allegations therein, except Defendant expressly denies that Plaintiff duly performed all terms and conditions of the said agreements required on his part to be performed.

III.

Defendant denies each and every allegation and averment in Paragraphs V, VI, and VII of Plaintiff's Complaint.

Second Defense

For a further and second answer and separate defense to the Complaint, Defendant alleges as follows:

I.

Plaintiff, as a member of the Brotherhood of Railroad Trainmen, and acting under the provisions of the Railway Labor Act (45 U.S.C.A. Sec. 151 et seq.), and the terms and conditions of the collective bargaining agreement alleged in the Complaint, on or about the 27th day of July, 1949, requested Death Valley Lodge No. 781, Brotherhood of Railroad Trainmen, to take action for his reinstatement as an employee of the Defendant. Defendant further alleges that at the time of the discharge of the Plaintiff and the said written request by the Plaintiff for action in his behalf by the Brotherhood of Railroad Trainmen, and at all times mentioned in the Complaint, the Constiution, By-Laws and Rules of the said Brotherhood of Railroad Trainmen contained a provision relating to grievances, and authorization of the said Brotherhood by members, reading as follows:

"Except in individual cases where the member or members involved serve seasonable written notice on the Brotherhood to the contrary, each member of the Brotherhood of Railroad Trainmen grants full and complete authority to the said Brother-

hood and any and all of its duly constituted representatives to act for him and in his name for the purpose of collecting, settling, compromising, amending, dismissing, or in any other manner disposing of any and all of his claims, complaints or grievances against his railroad and motor carrier employers, and authorizes the Brotherhood and its representatives to submit such claims, complaints or grievances for determination to any person, board or other tribunal provided by law or otherwise which to the Brotherhood or its representatives may be deemed necessary or advisable, and the Brotherhood and its representatives shall have full and complete authority to receive notice of hearings, if any, or to waive hearing, and to appear for, represent and act for its members before such person, board or other tribunal in connection with the consideration and determination of such claims, complaints or grievances; provided, that any adverse action by the Brotherhood or its representatives on any such claim, complaint or grievance shall be subject to the appropriate right of appeal under the terms and limitations of this constitution."

II.

Defendant further alleges that the said Brotherhood of Railroad Trainmen, acting pursuant to the written request of the Plaintiff, and pursuant to its Constitution, By-Laws and Rules, including the aforesaid authorization by the Plaintiff as a member of said Brotherhood, submitted the claim of the Plaintiff for restoration to service with all rights

unimpaired and for pay for all time lost, by letter to the Defendant dated October 29, 1949; that thereafter, Mr. L. E. Foley, General Chairman of the Brotherhood of Railroad Trainmen, with the knowledge and approval of the Plaintiff, requested the Defendant to join with the said Brotherhood in a submission of said claim to the National Railroad Adjustment Board pursuant to the provisions of the Railway Labor Act; that the said Brotherhood and the Defendant were unable to agree upon a statement of facts, and that the said claim was thereafter filed and docketed with the National Railroad Adjustment Board on the 11th day of January, 1951, with the knowledge and approval of the Plaintiff, acting by and through the Brotherhood of Railroad Trainmen. The Defendant filed and docketed its response to the Plaintiff's submission, and the Plaintiff subsequently filed and docketed with the National Railroad Adjustment Board his rebuttal to the Defendant's submission. Oral hearing was waived in the submission by the Plaintiff and was agreed to in the submission by the Defendant. Thereafter, the National Railroad Adjustment Board, First Division, on the 25th day of June, 1952, filed and docketed its findings and award, expressly denying the claim of the Plaintiff for restoration to service with all rights unimpaired and for pay for all time lost.

III.

Defendant alleges that the aforesaid award of the National Railroad Adjustment Board is final and

binding upon the Plaintiff and the Defendant in this action and constitutes a final and complete determination of all matters complained of by the Plaintiff in this action, and that the election of the Plaintiff to pursue the remedy provided by the Railway Labor Act and the said collective bargaining agreement constitutes a bar to the maintenance of the above entitled action by the Plaintiff.

Wherefore, Defendant prays judgment for Defendant and against the Plaintiff, for costs of suit herein, and for all proper relief.

E. E. BENNETT,
EDWARD C. RENWICK,
MALCOLM DAVIS,
CALVIN M. CORY,
/s/ By CALVIN M. CORY,
Attorneys for Defendant.

Acknowledgment of Service Attached.

[Endorsed]: Filed June 13, 1956.

[Title of District Court and Cause.]

REQUEST FOR ADMISSION

To: L. L. Price and his attorneys, Ralli, Rudiak & Horsey.

Defendant, Union Pacific Railroad Company, requests Plaintiff within ten days after service of this request, to make the following admission for the purpose of this action only, and subject to all perti-

nent objections to admissibility which may be interposed at the trial:

1. That at all times mentioned in the Complaint and pertinent to this action, the Constitution, By-Laws and Rules of the Brotherhood of Railroad Trainmen contained a provision relating to grievances and authorization of the said Brotherhood by its members reading as follows:

"Except in individual cases where the member or members involved serve seasonable written notice on the Brotherhood to the contrary, each member of the Brotherhood of Railroad Trainmen grants full and complete authority to the said Brotherhood and any and all of its duly constituted representatives to act for him and in his name for the purpose of collecting, settling, compromising, amending, dismissing, or in any other manner disposing of any and all of his claims, complaints or grievances against his railroad and motor carrier employers, and authorizes the Brotherhood and its representatives to submit such claims, complaints or grievances for determination to any person, board or other tribunal provided by law or otherwise which to the Brotherhood or its representatives may be deemed necessary or advisable, and the Brotherhood and its representatives shall have full and complete authority to receive notice of hearings, if any, or to waive hearing, and to appear for, represent and act for its members before such person, board or other tribunal in connection with the consideration and determination of such claims, com-

plaints or grievances; provided, that any adverse action by the Brotherhood or its representatives on any such claim, complaint or grievance shall be subject to the appropriate right of appeal under the terms and limitations of this constitution."

E. E. BENNETT,
EDWARD C. RENWICK,
MALCOLM DAVIS,
CALVIN M. CORY,

/s/ By CALVIN M. CORY,
Attorneys for Defendant.

Receipt of Copy Acknowledged.

[Endorsed]: Filed July 6, 1956.

[Title of District Court and Cause.]

DEPOSITION OF D. R. ALTIER

a witness herein, taken on behalf of defendant, at 2:00 p.m., Friday, July 20, 1956, at 215 West 7th Street, Los Angeles, California, before Edward A. Oreb, a Notary Public within and for the County of Los Angeles and State of California, pursuant to the annexed notice and stipulation.

Appearances of Counsel: For Plaintiff: Ralli, Rudiak & Horsey (no appearance). For Defendant: E. E. Bennett, Esq., Edward C. Renwick, Esq., Malcolm Davis, Esq., Calvin M. Cory, Esq., by Calvin M. Cory, Esq.

Reported by Edward A. Oreb, CSR.

(Deposition of D. R. Altier.)

Mr. Cory: This is the time fixed to take the deposition of Mr. Altier pursuant to stipulation entered into between the plaintiff and the defendant and a notice duly served upon the plaintiff of the taking of the deposition. Let the record show that Mr. Altier has been served with a subpoena and is testifying pursuant to a subpoena duces tecum.

D. R. ALTIER

a witness herein, having been first duly sworn, deposed and testified as follows:

Direct Examination

Q. (By Mr. Cory): Will you please state your name. A. Daniel R. Altier.

Q. Where do you reside, Mr. Altier?

A. 4059 Garden Avenue, Los Angeles 39.

Q. Are you the general chairman of the Brotherhood of Railroad Trainmen for this division?

A. I am for this district.

Q. For this district?

A. South central district.

Q. Will you please state for the record your official capacity?

A. General chairman, Brotherhood of Railroad Trainmen, Southwest District.

Q. Would that be Pacific?

A. Union Pacific Railroad.

Q. How long have you been general chairman, approximately?

A. Since December the 29th, 1952.

(Deposition of D. R. Altier.)

Q. Prior to that time did you hold a position with the Brotherhood of Railroad Trainmen?

A. I was local chairman representing yardmen in the Los Angeles terminal and also secretary of this full general—of the general committee.

Q. Do you have with you the file of the Brotherhood of railroad Trainmen with reference to the dismissal of Mr. L. L. Price by the Union Pacific Railroad Company?

A. I have the file, the necessary papers in answer to the subpoena served me.

Q. Has that file been in your possession since you assumed the office of general chairman?

A. Yes.

Q. Prior to that time, was that file in the possession of your predecessor Mr. Foley?

A. Yes, sir.

Q. And at all times has been in the possession of the Brotherhood of Railroad Trainmen?

A. Yes, sir.

Q. Now, referring to the file, will you please describe how this matter originated insofar as the Brotherhood of Railroad Trainmen are concerned? Let me rephrase the question.

Will you please state the date and nature of the first communication in your file?

A. Will you please read that question back to me first.

(The question was read by the reporter.)

Q. (By Mr. Cory): That would be this letter from Mr. Price to which is attached the date and

(Deposition of D. R. Altier.)

nature of the first communication in your file signed by Mr. L. L. Price.

A. Under date of July 27th, 1949, Las Vegas, Nevada, addressed to Mr. Claude Thompson and Mr. E. C. Grounds, Death Valley Lodge number 761, Las Vegas, Nevada.

The nature of the correspondence indicates that Mr. Price was advising the secretary of his lodge and his local representative the circumstances that resulted in his being discharged from the services of the Union Pacific Railroad Company.

Q. Does the letter to which you have just referred appear in the employes rebuttal submission on file with the Railroad Adjustment Board?

A. Yes, sir.

Q. Is there a letter in your file, Mr. Altier, from Mr. Thompson to your predecessor Mr. Foley?

A. There is a letter dated Las Vegas, Nevada, February 27, 1950, addressed to Mr. L. E. Foley.

Q. Will you read it?

A. "General chairman No. BRT, 215 West 7th Street, Los Angeles.

"Dear Sir and Brother:

The attached case of Brother L. L. Price for reinstatement with pay for time lost and all rights unimpaired was handled by local chairman E. C. Grounds and no satisfactory agreement reached with the superintendent. At a regular meeting of Death Valley Lodge number 781 held on February 26, 1950, the case was approved for further handling by the general chairman.

(Deposition of D. R. Altier.)

"Fraternally yours, C. W. Thompson, SNT, Secretary and treasurer, Lodge number 781."

Q. Now, thereafter did Mr. Foley direct a letter to Mr. Price and if so what was the date of that letter?

A. The file indicates that on May 31, 1950, addressed to Mr. L. L. Price, 2400 Lewis Avenue, Las Vegas, Nevada, re brakeman, L. L. Price request for reinstatement with all rights unimpaired and pay for time lost subsequent to July 13, 1949.

"Dear Sir and Brother:

The above captioned case having been referred to this office by action of Lodge 781 on February 27th, 1950, has been handled in accordance with the by-laws of this organization up to and including a conference with the general manager in Salt Lake City on May 22, 1950, with no satisfactory adjustment agreed upon.

"I am attaching hereto a copy of my letter addressed to the general manager requesting that he join me in a submission of this case to the first division of the National Railroad Adjustment Board. At this time I desire to point out to you that the general manager in his conference on May 22nd, agreed to your reinstatement on a leniency basis. This proffer in my opinion was inconsistent with consideration given to you in the past and consequently was not accepted by the undersigned. However, I want it understood that you have the privilege of ordering this committee to settle your case as you see fit. Notwithstanding this, unless I hear

(Deposition of D. R. Altier.)

from you to the contrary, I shall proceed to make presentation of this case to the first division of the National Railroad Adjustment Board. As previously related to you we can always withdraw the case from the board in a settlement agreed to by both the carrier and the organization. It is my opinion that to best protect your interests, this case should be prepared for the first division of National Railroad Adjustment Board.

Fraternally yours, L. E. Foley, General Chairman BRT."

Q. Mr. Altier, will you please also read into the record the contents of the letter referred to by Mr. Foley?

A. Dated May 31, 1950.

"Mr. F. C. Paulson, General Manager, Union Pacific Railroad Company, 10 South Main Street, Salt Lake City, Utah.

"Re brakeman L. L. Price request for reinstatement with all rights unimpaired and pay for time lost subsequent to July 13, 1949.

"Dear Sir:

Your letter of May 22nd, 1950, your file 011. 1221, setting forth your position relative to the above captioned case after our discussion while in conference in Salt Lake City on May 22nd is not acceptable. The Committee's contention as set forth in our letter of March 27, 1950, that brakeman Price was removed from service without a proper and thorough investigation provided for in Article 33 of the Agreement effective April 1, 1943, has not changed.

(Deposition of D. R. Altier.)

"You are therefore hereby requested to join us in a submission of this case to the First Division of the National Railroad Adjustment Board and to fix a date, time and place for our meeting in an effort to agree upon a joint statement of facts in connection therewith.

"Very truly yours, L. E. Foley, General Chairman—BRT."

Q. Now, what is the next communication in your file thereafter from Mr. Foley to Mr. Price if any?

A. Under date of January 12, 1951, addressed to Mr. L. L. Price, 1400 Lewis Avenue, Las Vegas, Nevada.

"Re brakeman, L. L. Price request for reinstatement [7] with all rights unimpaired and pay for time lost subsequent to July 13, 1949.

"Dear Sir and Brother:

"The above captioned case having been prepared by this office for ex parte submission to the first division of the National Railroad Adjustment Board has been referred to the Brotherhood's statistical department, which department has approved such submission. The necessary copies of the submission have today been furnished to the secretary of the first division of the National Railroad Adjustment Board. Representatives of the carrier have 30 days in which to prepare their ex parte submission upon receipt of which this office will furnish the secretary of your lodge and the local chairman with a copy of both parts of the ex parte submission. You will be advised accordingly.

(Deposition of D. R. Altier.)

"Fraternally yours, L. E. Foley, General Chairman—BRT."

Q. What is the next communication if any from Mr. Foley to Mr. Price?

A. Dated February 13, 1951, addressed to Mr. L. L. Price, 1400 Lewis Avenue, Las Vegas, Nevada.

"Re brakeman, L. L. Price request for reinstatement with all rights unimpaired and pay for time lost subsequent to July 13, 1949.

"Dear Sir and Brother:

"Enclosed herewith is a copy of the carrier's plea for a 30 day extension of time for the preparation of [8] their rebuttal to our submission of your case which letter is self-explanatory. I shall keep you fully advised of all future developments.

"Fraternally yours, L. E. Foley, General Chairman, BRT."

Q. Will you please read into the record the copy of the letter referred to by Mr. Foley?

A. "Dated February 6, '51," addressed to Mr. T. S. McFarland, Executive Secretary, First Division National Railroad Adjustment Board, 39 South La Salle Street, Chicago, Illinois.

"Dear Sir:

"Referring to your letter dated January 15, 1951, your file U-1040 concerning ex parte submission received by you from general chairman L. E. Foley of the Brotherhood of Railroad Trainmen on behalf of brakeman L. L. Price and advising that carrier's answer would be due by February 14, 1951,

(Deposition of D. R. Altier.)

it is necessary that carrier request an extension of time from February 14 to March 16 in which to file answer to the employee's ex parte submission in this dispute.

"Messrs. Kennedy and Foley are being advised of carrier's request by copy of this letter.

"Very truly yours," stamped "Original signed by E. J. Connors."

Q. What is the next communication if any from Mr. Foley to Mr. Price? [9]

A. It is dated April 14, 1951, addressed to L. L. Price, 1400 Lewis Avenue, Las Vegas, Nevada.

"Re brakeman L. L. Price request for reinstatement with all rights unimpaired and pay for time lost subsequent to July 13, 1949.

"Dear Sir:

"Further in connection with my letter of January 12, 1951, with reference to the above captioned case this will serve to advise that the submission of this case has been completed. It has passed all statistical boards. Has been accepted by Division 2 of the National Railroad Adjustment Board and has been assigned docket number 27393. It will be heard in its proper turn before said board. All concerned will promptly be advised of the decision of the board on this case.

"Very truly yours, L. E. Foley, General Chairman, BRT."

Q. What is the next communication if any from Mr. Foley to Mr. Price?

(Deposition of D. R. Altier.)

A. "July 1, 1952, Mr. L. L. Price, 1400 Lewis Avenue, Las Vegas, Nevada.

"Re brakeman, L. L. Price request for reinstatement with all rights unimpaired and pay for time lost subsequent to July 13, 1949.

"Dear Sir and Brother:

"I am attaching hereto a copy of award number 15509 in disposition of docket number 27393 which represents your case as presented to the First Division of the [10] National Railroad Adjustment Board by this committee.

"It is with the deepest regret that I note this award denies your case in its entirety. I was of the opinion that your case was the best we had before this tribunal. While this decision is from the highest board provided for in the National Railway Labor Act as in many other matters of litigation, I share with you and no doubt others the feeling that no justice was accomplished in this decision. However, in reviewing the file I cannot think of any additional supporting facts which would have in any manner affected the decision in this case. May I at this time express my sincere appreciation for your co-operation in this matter. I assure you that this committee is very deeply concerned over this decision and sincerely shares with you the disappointment.

"Fraternally yours, L. E. Foley, General Chairman, BRT."

Q. Are there any additional communications from Mr. Foley to Mr. Price in your file?

(Deposition of D. R. Altier.)

A. I find none.

Q. Now, with the exception of the letter dated July 27th, 1949, signed by Mr. Price, is there any other communication in your file signed by Mr. Price? Well, let's see. Is there any other communication in your file to the Brotherhood of Railroad Trainmen signed by Mr. Price?

A. I find none.

Q. Is there any letter in your file signed by Mr. [11] Price requesting the Brotherhood of Railroad Trainmen to cease handling his case before the Railroad Adjustment Board? A. No, sir.

Mr. Cory: I have nothing further.

/s/ D. R. ALTIER,
Witness.

Subscribed and sworn to before me this 15th day of August, 1956.

[Seal] /s/ W. L. HEATHCOTE,
Notary Public in and for the County of Los Angeles, State of California. [12]

[Endorsed]: Filed July 13, 1956.

[Title of District Court and Cause.]

MOTION FOR LEAVE TO MOVE FOR SUMMARY JUDGMENT AND FOR SUMMARY JUDGMENT

The defendant, Union Pacific Railroad Company, a corporation, has heretofore moved the court to enter summary judgment in its favor, which motion was denied May 11, 1956. In view of admissions on the part of the plaintiff made subsequent to that date and in view of the contents of the deposition of D. R. Altier on file herein, said defendant now moves the court for leave to move again for summary judgment and also move the court for its order entering summary judgment for said defendant.

Notice of Motion

To: L. L. Price, Plaintiff, and Ralli, Rudiak & Horsey, His Attorneys.

You, and Each of You, Will Please Take Notice that on Friday, November 23, 1956, at 10:00 o'clock A.M., or as soon thereafter as counsel can be heard, at the court room of the Honorable Roger T. Foley, Judge, located in the Federal and Post Office Building at 301 Stewart Avenue, Las Vegas, Nevada, the defendant, Union Pacific Railroad Company, a corporation, will move the court for an order granting leave to make a motion for summary judgment and for an order granting summary judgment in favor of the defendant.

Said motion will be made pursuant to Rules 12(b) and 56 of the Federal Rules of Civil Procedure on the ground that the complaint fails to state a claim upon which relief can be granted and that there is no genuine issue as to any material fact in the above entitled action.

Said motion will be based upon this Notice, together with the Memorandum of Points and Authorities in support thereof and the Memorandum of Points and Authorities in support of said original motion for summary judgment. Said motion will also be based on the affidavit of Calvin M. Cory attached to said original Motion and the other papers attached to and filed in connection with said original Motion. Said motion will also be based on the affidavit of A. J. VanDercreek and the affidavit of H. J. Reeser on file herein and also upon the deposition of D. R. Altier on file herein and the provisions of the Constitution, Bylaws and Rules of the Brotherhood of Railroad Trainmen, as set forth in defendant's request for admission on file herein.

Dated: October 30, 1956.

E. E. BENNETT,
EDWARD C. RENWICK,
MALCOLM DAVIS,
CALVIN M. CORY,
/s/ CALVIN M. CORY,
/s/ By MALCOLM DAVIS,
Attorneys for Defendant.

Acknowledgment of Service Attached.

[Endorsed]: Filed Nov. 6, 1956.

[Title of District Court and Cause.]

MOTION AND NOTICE OF MOTION FOR SUMMARY JUDGMENT ON BEHALF OF DEFENDANT

The Defendant, Union Pacific Railroad Company, a corporation, by Cory, Denton & Smith, its attorneys, hereby moves the Court to enter Summary Judgment for the Defendant, and in support of said motion in accordance with the provisions of Rule 56(b) of the Rules of Civil Procedure, the Defendant refers this Court to the Affidavit of Calvin M. Cory attached to the original Motion for Summary Judgment on Behalf of Defendant, the certified copy of Plaintiff's Submission and Award No. 15509 in Docket No. 27393 of the National Railroad Adjustment Board attached to the Defendant's original Motion for Summary Judgment, the original copy of the so-called Agreement, effective April 1, 1943, between the Union Pacific Railroad Company and the Brotherhood of Railroad Trainmen attached to Defendant's original Motion for Summary Judgment, the certified copy of Employee's Rebuttal to Carrier's Submission on file herein, all of the pleadings of record including the Answer of the Defendant, the affidavit of A. J. Vandercreek and the affidavit of H. J. Reeser on file herein, the deposition of D. R. Altier, General Chairman of the Brotherhood of Railroad Trainmen (South Central District) on file herein, the provisions of the Constitution, By-Laws and Rules

of the Brotherhood of Railroad Trainmen as set forth in Defendant's Answer and admitted by Plaintiff's failure and refusal to reply to Defendant's Request for Admissions on file herein. The Defendant further refers the Court to the attached Memorandum of Points and Authorities in support of this motion.

Notice of Motion

To: L. L. Price, Plaintiff, and Ralli, Rudiak & Horsey, His Attorneys:

You, and Each of You, Will Please Take Notice that on Monday, the 4th day of March, 1957, at 10:00 o'clock A.M. thereof, or as soon thereafter as counsel can be heard, at the Courtroom of the Honorable Roger T. Foley, located in the Federal and Post Office Building at 301 Stewart Avenue, Las Vegas, Nevada, the Defendant, Union Pacific Railroad Company, a corporation, will move the Court for an order granting summary judgment in favor of the Defendant.

Said motion will be made pursuant to Rules 12(b) and 56, Federal Rules of Civil Procedure, on the ground that the Complaint fails to state a claim against this Defendant upon which relief can be granted, that there is no genuine issue as to any material fact in the above entitled action, and that the pleadings, affidavits, exhibits, deposition and admissions on file herein show that the Defendant is entitled to judgment as a matter of law.

Plaintiff's Complaint purports to state a cause of action based upon an alleged wrongful dismissal in violation of the terms of a certain collective bargaining agreement effective April 1, 1943, between the Brotherhood of Railway Trainmen and the Defendant.

This petitioning Defendant alleges that any judicially enforceable cause of action arising from the termination of the employment relationship between Plaintiff and the Defendant is now barred by the adjudication and determination of the validity of such termination by the National Railroad Adjustment Board under the terms and conditions of said collective bargaining agreement, and pursuant to and in conformance with the Railway Labor Act (45 U.S.C.A. Sec. 151, et seq.)

Said motion will be based upon this Notice of Motion, together with the Memorandum of Points and Authorities in support thereof attached hereto, the Affidavits of Calvin M. Cory attached to the original Motion for Summary Judgment and all other papers attached to or filed in connection with said original Motion for Summary Judgment; the affidavits of A. J. Vandercreek and H. J. Reeser, and the Deposition of D. R. Altier, all of which are on file herein, as well as the Constitution, By-Laws and Rules of the Brotherhood of Railroad Trainmen, as set forth in Defendant's Request for Admission on file herein, and all of the pleadings and papers on file herein.

Dated: January 21, 1957.

E. E. BENNETT,
EDWARD C. RENWICK,
MALCOLM DAVIS,
CORY, DENTON & SMITH,

/s/ By CALVIN M. CORY,
Attorneys for Defendant.

Acknowledgment of Service Attached.

[Endorsed]: Filed Jan. 21, 1957.

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated and Agreed by and between the parties hereto, through their respective counsel of record, that at all times mentioned in the complaint, and pertinent to this action, the constitution of the Brotherhood of Railroad Trainmen contained the following sections:

"Dues—When Payable.

"Sec. 129. The dues of members shall be paid monthly in advance, before the first day of each month, to the treasurer, or collector (when such office exists), and shall be conditioned upon the class of certificate held in the Insurance Department, and shall not be less than the amount of the monthly assessment levied by the General Secretary and Treasurer on each certificate. All members admitted or readmitted must pay dues for the

month in which they are admitted or readmitted."

"Expelled For Non-Payment of Dues.

"Sec. 141. Any member failing or refusing to pay his dues and assessments, as required by Section 129, becomes expelled without any notice or further action whatsoever and at that instant any and all insurance certificates held by him shall be void, and all rights and benefits of insurance membership shall cease and be determined. If a lodge advances a member money for the payment of dues, he shall be required to repay the same within the time set by the lodge for such repayment, or shall become expelled as for non-payment of dues. The minutes of the lodge should show the time set for the repayment of money so advanced for this purpose.

"Where it is proven that a member has been expelled and readmitted through the fraudulent action of the local treasurer without said member's knowledge, said member shall be granted continuous membership."

It Is Further Stipulated and Agreed that at all times mentioned in the complaint and pertinent to this action, Rule No. 5 of the Brotherhood of Railroad Trainmen read as follows:

"Consideration of Grievances.

"No. 5. Any member considering that he has

been unjustly dealt with by his employer, or that he is otherwise aggrieved or is denied compensation for time lost and expenses incurred by sustaining minor personal injuries in line of service, shall make a comprehensive statement of the grievance in writing containing all of the material facts necessary for a clear understanding of the grievance and present or mail the same to the secretary of his lodge for handling at the next regular meeting. The lodge shall then determine by a majority vote of the members present, employes of the division, whether to sustain or reject the grievance. Should the grievance be sustained, the lodge will then authorize either the local chairman or the local grievance committee to lay the matter before the trainmaster, superintendent, or other proper officer, and use every means to effect a satisfactory settlement, and report his or their action and all things pertaining to the case to the lodge. If the result is not satisfactory, it may be referred to the general grievance committee for further action. A member or a lodge may withdraw a grievance placed in the hands of a general grievance committee, provided such action is taken before said grievance has been presented by the general grievance committee to the officer of the company, but not thereafter. All grievances must be handled by the regular local grievance committee, or by the local chairman if the lodge so directs, before being referred to the general grievance committee for adjustment. Grievances pertaining solely to members employed on a particular road or division or bus line shall

be disposed of by a majority vote of the members of the lodge who are employed on such road or division or bus line; provided that at least five such members must be present to take action upon such grievance. On small systems where the office of general chairman is maintained, upon the request of all lodges on such systems, the President of the Brotherhood may issue dispensation permitting the general chairman to handle local grievances."

Dated this 20th day of May, 1957.

/s/ SAMUEL S. LIONEL,
Attorney for Plaintiff.

E. E. BENNETT,
EDWARD C. RENWICK,
MALCOLM DAVIS,
CORY, DENTON & SMITH,
/s/ By CALVIN M. CORY,
Attorneys for Defendant.

Approved:

/s/ JOHN R. ROSS,
United States District Judge.

May 21st, 1957.

[Endorsed]: Filed May 21, 1957.

In the United States District Court
for the District of Nevada

No. 117

L. L. PRICE, Plaintiff,

vs.

UNION PACIFIC RAILROAD, Defendant.

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

The defendant's motion for summary judgment came on for argument this 22nd day of May, 1957, Calvin M. Cory appearing for the defendant, and Samuel S. Lionel appearing for the plaintiff, and the matter being argued and by the Court fully considered the Court finds from the pleadings, admissions, and affidavits on file that there is no genuine issue of any material fact and that the defendant is entitled to a judgment as a matter of law, and that such showing has not been successfully controverted by the plaintiff; now, therefore, and good cause appearing, it is

Ordered, that the motion of the defendant for summary judgment be and the same is hereby granted.

Dated at Las Vegas, Nevada, this 22nd day of May, 1957.

/s/ JOHN R. ROSS,
United States District Judge.

[Endorsed]: Filed May 24, 1957.

[Title of District Court and Cause.]

DOCKET ENTRY OF MAY 24, 1957

Filing & Entering Order Granting Motion for Summary Judgment. Judgment: Ordered that defendant's Motion for Summary Judgment be and the same is hereby granted.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that L. L. Price, plaintiff above-named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Order granting defendant's Motion for Summary Judgment, entered in this action on May 24, 1957.

Dated this 21st day of June, 1957.

/s/ SAMUEL S. LIONEL,
Attorney for Appellant.

[Endorsed]: Filed June 21, 1957.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Oliver F. Pratt, Clerk of the United States District Court for the District of Nevada, do hereby certify that the attached and accompanying documents are the originals filed in this Court, or true

and correct copies thereof, as called for by the Designation of Contents of Record on Appeal filed herein by the appellant and the appellee, and they constitute the record on appeal herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 15th day of July, A.D., 1957.

[Seal] OLIVER F. PRATT,
Clerk,

/s/ By FRANCES PETTINGILL,
Deputy Clerk.

[Endorsed]: No. 15649. United States Court of Appeals for the Ninth Circuit. L. L. Price, Appellant, vs. Union Pacific Railroad, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Nevada.

Filed: July 17, 1957.

Docketed: July 31, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15649

L. L. PRICE, Appellant,

vs.

UNION PACIFIC RAILROAD, Appellee.

STATEMENT OF POINTS

Pursuant to Rule 17, the appellant hereby states that the point upon which he intends to rely in his appeal from the Summary Judgment herein is as follows:

1. The Court erred in holding that the award of the National Railroad Adjustment Board entitled the appellee to Summary Judgment.

(The appellant does not rely on any claim that he did not authorize the submission of his case to the National Railroad Adjustment Board.)

/s/ SAMUEL S. LIONEL,
Attorney for Appellant.

Acknowledgment of Service Attached.

[Endorsed]: Filed July 30, 1957. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

DESIGNATION OF RECORD ON APPEAL

Pursuant to Rule 17, the appellant hereby designates the following portions of the record as material to the consideration of the appeal from the Summary Judgment herein:

1. Complaint.

2. Defendant's Answer to Complaint.

3. Motion for Leave to Move for Summary Judgment and for Summary Judgment and Notice of Motion, dated October 30, 1956.

4. Plaintiff's Submission and Award 15509 in Docket No. 27393 of the National Railroad Adjustment Board, attached to defendant's Motion and Notice of Motion for Summary Judgment, dated July 12, 1955.

5. Order Granting Motion for Summary Judgment, filed May 24, 1957.

6. Notice of Appeal, filed June 21, 1957.

7. Statement of Points, served herewith.

8. Designation of Record on Appeal, under Rule 17.

/s/ SAMUEL S. LIONEL,
Attorney for Appellant.

Acknowledgment of Service Attached.

[Endorsed]: Filed July 30, 1957. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

DESIGNATION BY APPELLEE OF ADDITIONAL PORTIONS OF RECORD ON APPEAL

In conformance with Rule 17 of the Rules of the U. S. Court of Appeals for the Ninth Circuit, the Appellee designates the following additional parts of the record which are material and which should be a part of the printed record:

1. Agreement between the Union Pacific Railroad Company and the Brotherhood of Railroad Trainmen effective April 1, 1943, and attached to defendant's original Motion for Summary Judgment filed July 12, 1955.

2. Motion and Notice of Motion for Summary Judgment on behalf of defendant, dated January 21, 1957, filed January 21, 1957.

3. Request for Admission served upon the plaintiff the 28th day of June, 1956, and filed July 6, 1956.

4. Affidavit of A. J. Vandercreek executed May 8, 1956, and filed on the 10th day of May, 1956.

5. Employees' Rebuttal to Carrier's Submission dated April 10, 1951, in Docket No. 27393 of the National Railroad Adjustment Board, First Division, attached to Defendant's Motion and Notice of Motion for Summary Judgment, dated July 12, 1955.

6. Deposition of D. R. Altier filed August 27, 1956.

7. Stipulation dated May 20, 1957, and filed the 21st day of May, 1957, concerning portions of the constitution and by-laws of the Brotherhood of Railroad Trainmen.

8. This designation.

Dated: July 31, 1957.

E. E. BENNETT,
EDWARD C. RENWICK,
MALCOLM DAVIS,
CORY, DENTON & SMITH,

/s/ By CALVIN M. CORY,
Attorneys for Appellee.

Acknowledgment of Service Attached.

[Endorsed]: Filed Aug. 5, 1957. Paul P. O'Brien, Clerk.

[fol. 101]

IN UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Minute entry of argument and submission—March 3, 1958 (omitted in printing).

[fol. 102]

IN UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Before: Healy, Pope and Hamley, Circuit Judges.

MINUTE ENTRY OF ORDER DIRECTING FILING OF OPINIONS AND FILING AND RECORDING OF JUDGMENT—May 20, 1958

Ordered that the typewritten opinion, and dissenting opinion of Healy, Circuit Judge, this day rendered by this Court in above cause, be forthwith filed by the Clerk, and that a Judgment be filed and recorded in the minutes of the Court in accordance with the majority opinion rendered.

[fol. 103]

IN UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 15,649—May 20, 1958

L. L. PRICE, Appellant,

vs.

UNION PACIFIC RAILROAD, Appellee.

Upon Appeal from the United States District Court for the District of Nevada.

OPINION

Before: Healy, Pope, and Hamley, Circuit Judges.

HAMLEY, Circuit Judge:

L. L. Price brought this action against Union Pacific Railroad Company, to recover damages in the amount of $118,517, alleging that he had been wrongfully dismissed as a trainman.

After the filing of an answer and the obtaining of certain admissions, defendant moved for a summary judgment. The motion was made on the ground that a determination made by the National Railroad Adjustment Board (Board) that the dismissal was valid precluded this independent court action. Agreeing with this view, the trial court granted summary judgment for defendant. Plaintiff appeals.

The single question presented on this appeal is whether, in view of the action of the Board in denying Price's claim for restoration with all rights unimpaired, and for back pay, the trial court was without jurisdiction to entertain this independent court action for damages.

Price had been employed by the railroad as a brakeman on its South Central District, operating out of Las Vegas, [fol. 104] Nevada. On July 12, 1949, he was instructed to deadhead on a 9:15 p. m. train to Nipton, California, a distance of 56.7 miles, for swing service at Nipton. He reached Nipton at 10:25 p. m., and telephoned the Las Vegas train dispatcher. The dispatcher told him to wait at Nipton until 4:00 a. m., at which time he was to serve as a swing brakeman on a train due at that hour.

Price, however, told the dispatcher that there was no place to eat or sleep in Nipton, and that he would return to Las Vegas on the first eastbound train. The dispatcher told Price not to do this, but he nevertheless returned to Las Vegas on a train which reached there at 12:35 a. m., on July 13. After obtaining food in Las Vegas, Price called the train dispatcher and stated that he was ready to return to Nipton on a train due to depart at 1:45 a. m. The dispatcher instructed Price not to return to Nipton.

On July 16, 1949, the railroad charged Price with violating operating rules 700 and 702. He was given written notice at that time to appear for investigation and hearing on these charges at 10:00 a. m., on the following day. Price appeared at the specified time and place, and requested a postponement upon the ground that his union representative was not present. A postponement until 9:30 the following morning was granted.

At this postponed hearing, Price requested a further postponement on the ground that his representative was still not available. He was then told that the investigation and

hearing would be deferred until 2:30 p. m., and was advised to get another representative.

Price did not appear at 2:30 p. m., and a hearing was conducted in his absence. Questions were propounded of various employees by an assistant superintendent, and a record of the proceedings was transcribed. On July 24, 1949, Price was discharged from the service of the carrier.

Price requested the Brotherhood of Railway Trainmen to seek his reinstatement with pay for time lost and all seniority and other rights restored. The Brotherhood negotiated with the railroad, as a result of which the latter offered to take Price back on a leniency basis. Price rejected this offer.

[fol. 105] On January 11, 1951, Price's claim for restoration to service with all rights unimpaired and for back pay was submitted by the Brotherhood, in behalf of Price, to the Board.[1] On June 25, 1952, the Board issued an award denying Price's claim in its entirety. On June 6, 1953, Price instituted this suit for damages in the District Court of the United States for the District of Nevada. Jurisdiction of the district court is based on diversity of citizenship.

As before indicated, the railroad was granted summary judgment on the ground that the Board award denying Price's claim barred this independent court action for damages. On this appeal, Price argues that a Board award denying the claim of a discharged employee does not preclude a subsequent independent court action for damages. Alternatively, he argues, if a Board award has such finality, it is only where the Board has made a determination on the merits, and no such determination was made in this case.

Under the act, an employee who believes that he has been wrongfully discharged may petition the Board for a redress of his grievance. Upon the filing of such a petition, the appropriate division of the Board is authorized to conduct a hearing, make findings, and issue an award in writing. If the award is in favor of the petitioner, the Board is to issue an order directing the carrier to make the award effective.

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[1] Pursuant to § 3, First (i) of the Railway Labor Act (act), as amended, 45 U.S.C.A., § 153, First (i).

If the carrier does not comply, the petitioner may institute an enforcement proceeding in the district court.[2]

Instead of pursuing this administrative remedy, however, an employee may seek relief by way of an independent court action, providing the state law does not require him to first exhaust his administrative remedies.[3] If, however, the ag- [fol. 106] grieved employee elects to proceed with his administrative remedy, and there obtains an adjudication on the merits, the award is "final and binding" upon both parties to the dispute, except in so far as it shall contain a money award.[4]

When such an award is adverse to the petitioner, he may nevertheless seek review thereof on a ground amounting to a denial of due process of law. Ellerd v. Southern Pacific Railroad Co. (7 Cir.), 241 F.2d 541. He may not, however, institute an independent court action to recover damages or obtain other relief.

In the present action, Price did not seek a review of the Board award. This is an independent suit for damages. Under the principles stated above, therefore, the court was without jurisdiction to entertain the action if the Board award represents a determination on the merits.

The question on the merits in this controversy is whether, under the terms of employment and the circumstances of this case, the railroad was entitled to discharge Price because of his return from Nipton to Las Vegas contrary to the direc-

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[2] Section 3, First (i)-(p) of the act, as amended, 45 U.S.C.A., § 153, First (i)-(p).

[3] Moore v. Illinois Central Railroad Company, 312 U. S. 630; Transcontinental & West Air. v. Koppal, 345 U. S. 653. It is not here contended that the law of Nevada required Price to exhaust the administrative remedy before instituting this court action.

[4] Section 3, First (m) of the act, as amended, 45 U.S.C.A., § 153, First (m); Elgin, Joliet & Eastern R. Co. v. Burley, 325 U. S. 711, reargued 327 U. S. 661; Washington Terminal Co. v. Boswell (D.C. Cir.), 124 F.2d 235, affirmed per curiam by an equally divided vote, 319 U. S. 732. That the award must represent an adjudication on the merits in order to be final and binding, see Michel v. Louisville & N. R. Co. (5 Cir.), 188 F.2d 224, 226; Washington Terminal Co. v. Boswell, supra, page 249; Koelker v. Baltimore and Ohio Railroad Co., 140 F. Supp. 887, 889.

tions of the train dispatcher. This was one of the two questions which Price submitted for Board determination. The other question which Price submitted to the Board was whether, prior to his discharge, he was accorded the kind of a hearing prescribed in the agreement between the railroad and the Brotherhood governing wages and working conditions.

In denying Price's claim, the First Division of the Board said:

> "If the carrier is to have efficient operations on its railroad, employes must be relied on to obey operating instructions and orders. Claimant was found to have wilfully disobeyed his orders. This was insubordination and merited discipline.
>
> [fol. 107] "The employe has been tendered reinstatement on a leniency basis but seeks complete vindication on the grounds that he was denied the investigation provided by the rules of agreement. Thus, the only question for review is whether there was substantial compliance with the investigation rule.
>
> "Basically, the complaint is that the hearing was held when the claimant was not present."

The Board then proceeded to discuss the manner in which the investigation was conducted by the carrier. It was concluded that none of Price's rights in that regard was abridged. The claim was accordingly denied.

It therefore appears that the Board made no determination on the merits of Price's complaint. The Board neither found nor concluded that the railroad was entitled to discharge Price. The written decision of the Board does not even mention this issue other than to report that "claimant was found to have wilfully disobeyed his orders." The finding thus reported was obviously not its own, but that of the superintendent of the railroad.

The reason that the Board did not deal with the merits of the controversy is that it believed, as stated in its decision, that "the only question for review is whether there was substantial compliance with the investigation rule." This was a plain misconstruction of Price's submission to the board,

since he had specifically presented the question on the merits.[5]

[fol. 108] Appellee argues that, if Price believed that the award did not represent a determination on the merits, he could have obtained an interpretation under the "finality" provision of the act.[6]

There was here no dispute "involving an interpretation of the award," as those words are used in the statute. The "award" was an outright denial of the claim,[7] as all parties concede. The statutory provision under which an interpretation of an award may be obtained does not, in our opinion, apply where the only dispute concerns the grounds relied upon in making an unambiguous award.

We conclude that Price did not obtain an adjudication upon the merits in the proceedings before the Board, and that the trial court therefore had jurisdiction to entertain this independent action for damages.

Reversed and remanded for further proceedings not inconsistent with this opinion.

---

[5] In the submission to the Board, on behalf of Price, complaint was made of the procedure followed during the railroad's investigation of the incident leading to his discharge. It was then stated:

> "The employees further contend that Brakeman Price did not violate any rules of leaving Nipton to secure food. That Brakeman Price was justified in these actions is supported by the provisions of Section (b) of Article 32 of the agreement effective April 1, 1943, reading as follows:
>
> "'Swing brakemen will not be tied up nor released at points where sleeping and eating accommodations are not available.'"

This statement was followed by a detailed discussion of the reasons why the railroad was not entitled to discharge Price, under the circumstances of this case.

[6] The last sentence of § 3, First (m) of the act, as amended, 45 U.S.C.A., § 153, First (m), reads: "In case a dispute arises involving an interpretation of the award, the division of the Board upon request of either party shall interpret the award in the light of the dispute."

[7] The Board decision ends with these words: "Award: Claim denied."

HEALY, Circuit Judge, Dissenting:

I am unable to go along with the holding of my associates that the Board made no disposition of the merits of appellant's complaint.

The Union, in its submission to the Board, admitted that appellant left Nipton and returned to Las Vegas; and it was not disputed that in doing so he deliberately disobeyed an order of the dispatcher. The Union sought to justify this admitted infraction of an operating order by reference to Section (b) of Article 32 of the Agreement, quoted by my associates in their footnote 5. In disposing of the case the Board, among other things, stated: "If the carrier is to have efficient operations on its railroad, employees must be relied on to obey operating instructions and orders."

It appears to me plain that the Board was of opinion, and in substance held, that the asserted violation by the Company of Article 32, even if true, would not serve to justify [fol. 109] an employee's violation of direct operating instructions and his abandonment of his post. Such a ruling would appear to promote safety in railroad operations, which must always take into account considerations of that nature.[1] With its intimate knowledge of the field, the Board is peculiarly equipped to make such a decision.

[File endorsement omitted]

---

[1] Section one of the Railway Labor Act, 45 USCA §151, under subdivision "Fifth" defines "employee" thus:

> "'The term 'employee' as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) . . ."

Section two of the Act, 45 USCA §151(a)(1), under the heading "General purposes," states one of its purposes to be:

> "to avoid any interruption to commerce or to the operation of any carrier engaged therein; . . ."

[fol. 110]

IN UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 15649

L. L. PRICE, Appellant,

vs.

UNION PACIFIC RAILROAD, Appellee.

JUDGMENT—Entered May 20, 1958

Appeal from the United States District Court for the District of Nevada.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Nevada, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the order of the said District Court in this cause be, and hereby is reversed, with costs in favor of the Appellant and against the Appellee, and that this cause be, and hereby is remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court.

It Is Further Ordered and adjudged by this Court that the Appellant recover against the Appellee for his costs herein expended and have execution therefor.

[File endorsement omitted]

[fol. 111]
IN UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Before: Healy, Pope and Hamley, Circuit Judges.

ORDER DENYING PETITION FOR REHEARING—July 7, 1958

On consideration thereof, and by direction of the Court, It Is Ordered that the petition of Appellee, filed June 18, 1958, and within time allowed therefor by rule of court for a rehearing of the above cause be, and hereby is denied.

HEALY, Circuit Judge, dissenting.

[fol. 112] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 113]
SUPREME COURT OF THE UNITED STATES

No. 414—October Term, 1958

UNION PACIFIC RAILROAD COMPANY, Petitioner,

vs.

L. L. PRICE

ORDER ALLOWING CERTIORARI—November 17, 1958

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted, and case transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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In the Supreme Court of the United States

OCTOBER TERM, 1958

UNION PACIFIC RAILROAD COMPANY,
Petitioner,

v.

I. L. PRICE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. ——

o——o——o

UNION PACIFIC RAILROAD COMPANY,
Petitioner,

v.

L. L. PRICE,
Respondent.

o——o——o

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

o——o——o

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on May 20, 1958.

CITATION TO OPINION BELOW

The District Court, in granting petitioner's motion for summary judgment (R. 94, 95),[1] issued no opinion. The opinion of the Court of Appeals, printed as Appendix B hereto (*infra*, p. 4a), is reported at 255 F. 2d 663.

1 Record references are to the printed record.

JURISDICTION

The judgment of the Court of Appeals, printed as Appendix C hereto (*infra*, p. 12a), was entered on May 20, 1958 (Tr. 110). Petition for Rehearing was denied on July 7, 1958 (Tr. 111). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1) providing for review of cases in the courts of appeals by writ of certiorari.

QUESTIONS PRESENTED

1. After a discharged employe of a railroad has voluntarily elected to present the dispute over his discharge, seeking reinstatement and back pay, to the National Railroad Adjustment Board, under the provisions of Section 3, First (i), of the Railway Labor Act, and after that Board has made its Award denying his claim and he does not challenge the validity of the Award on any statutory or constitutional basis, may he then institute an independent action for wrongful discharge in a United States District Court, or is he bound by his election?

2. In the situation described in Question 1, does a District Court have jurisdiction to review the grounds relied upon by the Board in making a denial award and, on the basis of such review, nullify or disregard the express intention of Congress, as set forth in Section 3, First (m) of the Act, that Board awards shall be "final and binding upon both parties"?

STATUTE INVOLVED

The statute involved is the Railway Labor Act, 45 U. S. C. Section 153, the pertinent portions of which are set forth in Appendix D to this petition (*infra*, p. 13a).

STATEMENT OF THE CASE

The respondent L. L. Price was formerly employed by petitioner Union Pacific Railroad Company as a brakeman at Las Vegas, Nevada. On July 12, 1949, he reported for duty at 9:15 p. m. and was instructed to deadhead on a train from Las Vegas to Nipton, California. He arrived at Nipton at about 10:25 p. m. and was then instructed to stay at that point and to perform brakeman service on a train due in about six hours (R. 17, 18, 20). Price protested that there were no eating and sleeping facilities at Nipton, but he was again instructed to stay there. Price refused to follow such instructions and returned to Las Vegas (R. 18, 24, 25, 27, 28).

On July 16, 1949, Union Pacific charged Price with violating its operating rules and gave him written notice that he was to appear for an investigation and hearing on such charges, the investigation to be conducted in accordance with the provisions of the applicable collective bargaining agreement between Union Pacific and the Brotherhood of Railroad Trainmen governing the wages and working conditions of brakemen (R. 13).

Although it had been twice postponed at his request, Price did not appear at the investigation and it was finally held in his absence (R. 12, 17). A record of the investigation was transcribed (R. 12-29). On July 24, 1949, Union Pacific notified Price of his discharge (R. 3, 7).

Price requested and authorized the Brotherhood to handle his grievance and to seek his reinstatement with pay for all time lost and all other rights restored (R. 51). This matter was handled in the usual manner between Union Pacific and the Brotherhood, but no adjustment

was reached (R. 29-38). On January 11, 1951, Price, through the Brotherhood, elected to refer such dispute, including his claim for reinstatement with back pay and restoration of all other employment rights, to the First Division of the National Railroad Adjustment Board (R. 5, 60), in accordance with provisions of Section 3, First (i) of the Railway Labor Act.

In support of his claim of wrongful discharge, Price relied upon two main grounds, first, that his refusal to follow his instructions was justified and hence it was not insubordination; and, second, that the provisions of the collective bargaining agreement were not complied with in that the investigation was held in his absence (R. 8, 9). Oral hearing before the Board was waived (R. 12, 57).

On June 25, 1952, the Board made an award denying Price's claim seeking reinstatement and back pay based on alleged wrongful discharge (R. 59). National Railroad Adjustment Board, First Division Award 15509. The Board's decision is printed at Appendix A hereto (*infra*, p. 1a) and consisted of three parts, the Statement of the Claim, the Findings and the Award.

The Board's Findings consisted of certain jurisdictional statements followed by a brief statement of the dispute and some of the reasons relied upon by it in making its Award. In the Findings the Board first considered Price's failure to follow instructions, stating that Price "was found to have willfully disobeyed his orders." Following which, it held "This was insubordination and merited discipline." (R. 57, *infra*, p. 1a). The Board then held that the Agreement had not been violated.

with respect to the manner of holding the investigation (R. 57-59, *infra*, p. 3a). The Findings did not contain any discussion of other points advanced by Price in support of his claim.

The Board's Award, itself, consisted of but two words "Claim denied" (R. 59, *infra*, p. 3a).

On June 6, 1953, Price filed his complaint in the United States District Court for the District of Nevada. Jurisdiction was invoked because of diversity of citizenship, plaintiff Price being a citizen of Nevada and the defendant a Utah corporation. Price alleged that his dismissal was in violation of the Agreement between the Brotherhood and Union Pacific and that he had been discharged without just cause. Damages in the amount of $118,517.00 were sought (R. 3-5).

In its answer, Union Pacific denied that Price had been wrongfully discharged and alleged that the Board's Award, denying Price's entire claim, was a "final and binding" determination of the dispute under Section 3, First (m) of the Act, and that his election to pursue the remedy provided by that Act constituted a bar to his complaint (R. 68-72). Union Pacific moved for a summary judgment (R. 87), which was granted on May 24, 1957 (R. 94-95).

The Court of Appeals for the Ninth Circuit, with Judge Healy dissenting, reversed the judgment of the District Court and remanded the case for further proceedings, 255 F. 2d 663; Appendix B, *infra*, p. 4a. In its opinion, that Court recognized and found that the Board had "issued an award denying Price's claim in its entirety" (Appendix B, *infra*, p. 6a). Nevertheless,

the Court reviewed the record before the Board and found that the submission of Price's dispute tendered two questions for determination, first, whether, under the circumstances, Union Pacific was entitled to discharge Price because of his failure to follow instructions, and, second, whether Price had been accorded the hearing provided for in the collective bargaining agreement. The Court decided that the first point constituted the "merits" of the dispute submitted to the Board (Appendix B, *infra*, p. 8a).

The Court then proceeded to review the Board's Findings and to determine the "grounds relied upon" in making such award. It held that, while the Board had determined the applicable agreement provisions had not been violated, the Board "misconstrued" Price's submission and had not considered or determined the other question presented; that it did not appear that the Board made any determination on the "merits" of Price's complaint. It said the Board "neither found nor concluded that the railroad was entitled to discharge Price." (Appendix B, *infra*, p. 9a). The Court held that because the Board had not passed on what the Court determined to be the merits of the dispute, the Award was not "final and binding" and the District Court had jurisdiction to entertain Price's action for damages.

Respondent Price did not challenge the validity of the Board's Award on any constitutional or statutory basis. His collateral attack on the Award, adopted by the Court below as the basis for its decision, was simply that the Board's Findings failed to explicitly state that under the facts Union Pacific was entitled to discharge him because of his failure to follow instructions.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

1. ELECTION OF REMEDIES.

The decision of the Court of Appeals for the Ninth Circuit in this case is in direct conflict with the decisions of the Court of Appeals for the Fifth Circuit in *Majors v. Thompson*, 235 F. 2d 449 (C. A. 5), and *Wooley v. Eastern Air Lines*, 250 F. 2d 86 (C. A. 5), certiorari denied, 356 U. S. 931. This conflict involves the effect of a discharged railroad employe's election to pursue his administrative remedy under Section 3, First (i), of the Railway Labor Act and whether by reason of such election, he is barred from seeking damages in an action at law for wrongful discharge. The Court below failed to perceive that Price's election to pursue his administrative remedy, by and of itself, barred any subsequent attempt to follow the other remedy irrespective of the ultimate disposition of the dispute by the Board.[2]

Majors held that an employe's action in voluntarily submitting his dispute to the Board in which he sought reinstatement constituted an election of "inconsistent and mutually exclusive" remedies and that such election operated to bar his right to subsequently litigate in the courts a claim for damages. The Court said:

> "* * * Where the employee has voluntarily applied to the Board for reinstatement an election of remedies has been made which bars the right to litigate before the courts a claim of damages for wrongful discharge. * * *" (235 F. 2d 449, 451-2)

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2 The Court of Appeals for the Ninth Circuit in a prior case correctly held that a discharged employe "having elected" to follow the administrative procedure of the collective bargaining agreement "debarred" a subsequent court action in spite of the fact that the employe abandoned pursuit of such remedy. *Peoples v. Southern Pacific*, 232 F. 2d 707, (C.A. 9), affirming 139 F. Supp. 783. *Breeland v. Southern Pacific*, (C.A. 9), 231 F. 2d 576. *Barker v. Southern Pacific*, 214 F. 2d 918; (C.A. 9).

The Court of Appeals for the Fifth Circuit did not inquire into or review the nature of the Board's decision or the "grounds relied upon" by the Board; the election of the administrative remedy by submitting the dispute to the Board was held to have barred the Court action.

In the *Wooley* case, the Court of Appeals for the Fifth Circuit also rejected an attempted attack on a Board award[3] on the basis of election of remedies, holding that the employe could not go to court after he had elected to go to the Board.

It has long been recognized that an election to pursue one of two inconsistent remedies precludes resort to the other without regard to the result of such pursuit. This Court, in *United States v. Oregon Lumber Co.*, 260 U. S. 290, 301, held that the nature of the final disposition was of no consequence in applying the doctrine of election of remedies:

> "* * * But the election was determined by the bringing and maintenance of the suit, not by the final disposition of the case by the court."

Accord: *Robb v. Vos*, 155 U. S. 13, 43; *Baltimore and O. R. Co. v. Brady*, 288 U. S. 448, 457; *Pennsylvania R. Co. v. Clark Coal Co.*, 238 U. S. 456, 470; and *Minnesota Nat. Bank v. Liberty National Bank*, 72 F. 2d 434, 436 (C. C. A. 10).

This Court's decisions in *Moore v. Illinois Central R. Co.*, 312 U. S. 630, and *Slocum v. Delaware & L. & W.*

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3 The *Wooley* case involved a denial award of an Airline System Board of Adjustment established by agreement under Section 204, Title II, of the Railway Labor Act.

R. Co., 339 U. S. 239, 244, made clear the election available to the discharged railroad employe. If he still considers himself an employe and asserts his right to be retained as such, he must go to the Board. If he accepts the discharge as final, he may sue in court for breach of contract. But he may not do both. He may proceed "*either* in accordance with the administrative procedures prescribed in his employment contract *or* he may resort to his action at law for alleged unlawful discharge if the state courts recognize such a claim." *T. W. A. v. Koppal*, 345 U. S. 653, 661 (Emphasis supplied). The Court also emphasized that the Act "provides a procedure for handling grievances so as to avoid litigation and interruptions of service * * *." (page 660).

2. FINALITY OF BOARD'S AWARD.

The Award of the Board in this matter was simply "Claim denied." (R. 59, *infra*, p. 3a). This is the "award" which Section 3, First (m) of the Railway Labor Act provides "shall be final and binding upon both parties to the dispute." The Court below failed to apply this unambiguous provision to Award 15509 disposing of Price's dispute with Union Pacific over his alleged wrongful discharge.

In this regard, there is a direct conflict between the decision below and the decisions of the Courts of Appeals for the Tenth, Second and Third Circuits in *Reynolds v. Denver & R. G. W. R. Co.*, 174 F. 2d 673 (C. A. 10); *Weaver v. Pennsylvania R. Co.*, 240 F. 2d 350 (C.A. 2), affirming *per curiam*, 141 F. Supp. 214 (S.D., N.Y.); and *Bower v. Eastern Airlines*, 214 F. 2d 623 (C.A. 3), certiorari denied 348 U. S. 871, respectively.

The Court of Appeals for the Tenth Circuit in the *Reynolds* case held the "final and binding" provision of Section 3, First (m) deprived the District Court of jurisdiction in an employe's action for damages brought subsequent to the rendition of an award by the Board.[4] The Act's language was held to be "clear and susceptible only of one construction, namely, that in cases other than where a money award is made the judgment [award] of the Board is final and binding upon the parties thereto." 174 F. 2d 673 at 675 (interpolation). In view of which that Court held the award "may not be challenged."

In *Weaver v. Pennsylvania R. Co.*, 240 F. 2d 350, the Court of Appeals for the Second Circuit affirmed a summary judgment for the railroad, adopting the opinion of the District Court, 141 F. Supp. 214. That Court held that a denial award of a System Board of Adjustment[4] in a discharge case was "conclusive upon an employee provided the applicable statutory and jurisdictional processes have been observed." (page 219)

The Court of Appeals for the Third Circuit in the *Bower* case, 214 F. 2d 623, held a discharged airline employe barred from bringing an action at law for damages after an Airline System Board of Adjustment had upheld the validity of his discharge, because of the "final and binding" provision of the agreement establishing the Board under Section 204, Title II, of the Railway Labor Act. The Court said:

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4 The System Board of Adjustment was established under Section 3, Second, of the Act by an agreement between the railroad and the labor organization, plaintiff's collective bargaining representative. It provided, as in Section 3, First (m), of the Act, that the awards of the Board would be "final and binding on all parties to the dispute."

"Whether we say that the party is bound by his own voluntary election between an administrative and an alternative judicial remedy, or describe the party who initiated the administrative proceeding as estopped from denying its agreed final and binding character, or view this as an application of the rationale of *res judicata* in a new area, we are satisfied that the court should declare and enforce a rule of repose against the reexamination of the merits of plaintiff's claim in this case." (214 F. 2d 623 at page 626)

In the instant case, instead of holding the Board's Award "final and binding", as required under Section 3, First (m), the Court below proceeded to review not only the Board's Findings, but the record of the submissions before the Board as well. (Appendix B, footnote 5, *infra*, p. 9a.) Notwithstanding its acknowledgment that the Board's Award was an "outright denial of the claim", the Court below, after its review, determined that the Board had "misconstrued" Price's submission and that the Board had failed to discuss, and pass upon, what the Court determined to be the "merits" of Price's dispute. On the basis of the foregoing rationale, the Court below held that the Award was not "final and binding."

The only requirement in the Act as to awards is that they shall be in writing and copies furnished the parties. Section 3, First (m). Nowhere in the Act is there any requirement that the Board must make a specific finding upon every point advanced in a dispute[5]; in fact, the Act does not require that findings be made. Findings are only mentioned in Section First (p), which pro-

5 In *Ramsey v. Chesapeake & O. R. Co.*, 75 F. Supp. 740, 742, (N.D. Ohio), the court noted that the Board had failed to make specific findings upon all of the facts and issues submitted to it, but, nevertheless, held the denial award final and binding, precluding any court review.

vides that in an enforcement action brought on a sustaining money award, the findings of the Board shall be "prima facie evidence of the facts therein stated." But this is no requirement that there be findings in every decision or that they specifically cover every question involved in the dispute. It was the ultimate disposition of the dispute, the award itself, which the Act made "final and binding."

Moreover, the decision of the Court below conflicts in principle with applicable decisions of this Court. In *Elgin, J. and E. R. Co. v. Burley,* 325 U. S. 711, 721, the decision involved whether a collective bargaining representative, absent other authority, had unilateral authority under the Act to compromise and settle accrued monetary claims of employes. There was also involved in that case the contention that in any event an award by the Board was not a final award but was merely advisory. This Court "put aside this broadest contention as inconsistent with the Act's terms, purposes and legislative history." Except where the Act provides for judicial review, the Act "purports to make the Board's decisions 'final and binding' ". (page 727)

More recently, in *Railroad Trainmen v. Chicago River and Indiana R. Co.,* 353 U. S. 30, 34, this Court again commented upon the "unequivocal" language of Section 3, First (m), in providing that the awards of the "Board are final and binding upon both parties." There appears little doubt but that the "final and binding" provision of the Act was essential to this Court's decision holding unlawful a strike over "minor disputes" or grievances pending before the Board.

3. THE COURT MISUNDERSTOOD THE NATURE AND MEANING OF THE BOARD'S DECISION.

The Court below misunderstood and misconceived the entire import of the Board's Findings and Award in determining that the Board had failed to pass upon the "merits" of Price's dispute with Union Pacific. Based on such misconception, the Court below decided the Award was not "final and binding." The Board, in its Findings, held that Price's failure to follow orders was "insubordination and merited discipline." (R. 57, *infra*, p. 1a). Petitioner submits that the Board could not have made this finding except after considering and rejecting the "merits" of Price's attempted justification for his admitted failure to obey orders.

After disposing of the so-called merit issue, the only remaining question for the Board's review was whether the alleged procedural defect was sufficient for the Board to disturb the discipline on the grounds that the investigation was conducted in Price's absence. The Court's misconception of the Board's decision stems from its attempt to determine what the Board "believed" from a statement made in the Findings after the Board had rejected Price's attempted justification for his failure to follow orders that, "Thus, the only question for review * * *" (R. 57, *infra*, p. 2a). Because of this statement, the Court concluded that this showed a "misconstruction" of Price's submission to the Board and that the Board had not passed upon the merit issue. It is submitted that this phrase was simply prefatory to the discussion of the alleged procedural defect in the holding of the investigation and does not indicate any failure on the Board's part to consider and pass upon Price's contention that his insubordination was justified. It is

a statement that having found Price's insubordination not justified, the only question left for review by the Board was the alleged agreement violation in the conduct of the hearing.

The misunderstanding of the Court below in its review and interpretation of the Board's Findings has been discussed because it shows the confusion which can and undoubtedly will result if a District Court has the jurisdiction to review "the grounds relied upon" by the Board in making a denial award. The inclusion of the "final and binding" provision in Section 3, First (m) of the Act compels the conclusion that it was just this sort of review which Congress sought to avoid.

The critical reading and review which the Court below has given the Board's Findings indicates a failure to appreciate that "The whole adjustment procedure up to the point of award, findings and order by the Board, appears to be constructed upon the idea that it is not the business of lawyers, but is the business of railroad men, workers and managers alike." *Washington Terminal Co. v. Boswell*, 124 F. 2d 235, 241 (C. A., D. C.), affirmed 319 U. S. 732.

Judge Goodrich, in *Kirby v. Pennsylvania R. Co.*, 188 F. 2d 793, 795, 796 (C. A. 3), discussed the nature of the Board's Findings in an action to enforce a Board award under Section 3, First (p). He pointed out that they are "a long way from being the neat, definite and precise findings of fact and conclusions of law from the pen of an experienced and conscientious trial judge * * *." But he recognized that it would be "doctrinaire and unreal-

istic" to insist on precise findings of fact.[6] *Virginian R. Co. v. System Federation No. 40*, 131 F. 2d 840, 844-45 (C. C. A. 4).

4. THE DECISION BELOW WILL CREATE DISPUTES AND LITIGATION.

The instant case raises important and novel problems arising under the Railway Labor Act and merits review by this Court. On two occasions, the Court has left open the questions presented here. *Elgin, Joliet & E. R. Co. v. Burley*, 325 U. S. 711, 720, and *Slocum v. Delaware, L. & W. R. Co.*, 339 U. S. 239, footnote 7 at 244. See, also, *Washington Terminal v. Boswell*, 124 F. 2d 235, 245, affirmed 319 U. S. 732.

By the decision below, United States District Courts are empowered to inquire into and review the "grounds relied upon" by the Board in making an award and, based on such review, decide whether an award is to be final and binding on the parties. To allow such an inquiry will effectively nullify the finality provisions of the Act. We submit that such an inquiry is contrary to the provisions of the Act and the intent of Congress. The Board was created to bring the "settlement of grievances * * * within a general and inclusive plan of *decision*." *Elgin, J. & E. R. Co. v. Burley*, 325 U. S. 711, 728 (Emphasis supplied).

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6 Judge Goodrich, again speaking for the Third Circuit, had no difficulty in applying the election of remedies doctrine as well as the finality provision of the Act to a similar award (National Railroad Adjustment Board, First Division Award 16427) where the Board had not passed on the merits of the employe's claim, but had dismissed it on the basis of its Finding that the "dispute was settled on the property by and between the parties to the controlling agreement * * *." *Barnett v. Pennsylvania-Reading Seashore Lines*, 245 F. 2d 579, 580 (C.A. 3).

The decision below will require a showing in every Board decision denying a claim involving discharge that the Board has considered and passed upon every question presented or contention advanced in support of a claim. Without such, Board awards will be subject to challenge and will not be accorded the "final and binding" effect provided in the Act. This requirement is foreign to the Railway Labor Act.

The failure of the Court below to accord "final and binding" effect to the Award of the Board subjects the railroads, in such cases, to a dual liability under mutually inconsistent remedies. It affords discharged employes an uneven advantage never contemplated. In this case, respondent is given another opportunity after an unsuccessful try at the Adjustment Board and the petitioner will be forced to relitigate a wrongful discharge dispute which is now nine years old.

The decision of the Court below abrogates petitioner's rights under the Railway Labor Act affording either party before the Board the right of Board decision and its "final and binding" effect. That right is a nullity under the decision below.[7]

Nor is the decision below confined in its effect to the instant case. In the railroad industry, almost all collective bargaining agreements covering all classes of employes contain provisions prescribing certain time limita-

7 "* * * If a carrier can have full advantage of the administrative proceeding, on the chance it will be successful, yet when the event is otherwise relieve itself of all its disadvantages, circumventing the employee's rights by judicial proceedings in which they are not available, the Railway Labor Act will have become, finally, a dead letter. * * *". *Washington Terminal Co. v. Boswell.* 124 F. 2d 235, 242.

tions which must be followed in the progression and handling of disputes, including discharge cases, both in the handling on the railroad property and before the Board as well.[8] Many cases involving discharges are progressed to the Board which have not been handled in accordance with the prescribed time limits. Generally, these are denied or dismissed by the Board solely for that reason. In such cases, the Board properly gives no consideration to the merits of the discharge.[9] The decision below opens the door to the employes in those cases and will permit them to bring a court action for damages for wrongful discharge.

One of the 21 grievances before the Board in the *Chicago River* case involved the discharge of an employe. 353 U. S. 30, 32. The railroad's defense thereto was that the grievance was barred by reason of the time limit provisions of the collective bargaining agreement. Subsequent to this Court's decision, the Board made an award denying the employe's right to reinstatement solely because of a failure to comply with the time limit provisions of the controlling agreement. The Board did not consider or pass upon the merits of his discharge. National Railroad Adjustment Board, First Division Award 18214. Under the holding below, that award would not be "final and binding" on the employe under Section 3, First (m) of the Act, and yet it was this finality provision which was at the basis of the Court's decision in the *Chicago River* case barring a strike over the same grievance.

Additionally, there are many instances[10] where the

8 See, for example, National Railroad Adjustment Board, First Division Awards 17439, 17611 and 18056.

9 See awards cited in footnote 8.

10 See, for example, National Railroad Adjustment Board, First Division Awards 16833, 16835, 16841 and 16871.

Board has denied or dismissed disputes involving the discharge of employes because they were not handled on the railroad property in accordance with the provisions of Section 3, First, (i), of the Act. In none of these cases does the Board consider the merits of the discharge. Here, too, the decision below may afford such employes the right to proceed against the railroad in a court action.

The Court below, while purporting to avoid any review of the Board's decision, nevertheless, did review and interpret the Board's Findings as well as Price's submissions to the Board, all in an effort to determine the nature of the questions presented and whether the Board gave proper consideration thereto in making its denial award. It is clear that the Act never intended such court review of what the Court below has described as an "unambiguous award". The Act was designed to settle disputes, not to create or prolong them, but that is the result.

Because the decision below has created important and unwarranted exceptions to the basic principles embodied in the Act and in this Court's opinions, and is in direct conflict with decisions of other courts of appeals, review by this Court is essential.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit should be granted.

Respectfully submitted,

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Counsel for Petitioner Union Pacific Railroad Company.

October, 1958.

APPENDIX A

Decision of National Railroad Adjustment Board

Award 15509
Docket 27393

NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION
39 South La Salle Street, Chicago 3, Illinois
With Referee A. Langley Coffey

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD TRAINMEN
UNION PACIFIC RAILROAD COMPANY
(South Central District)

STATEMENT OF CLAIM: "Claim for restoration with all rights unimpaired and for pay for all time lost for Brakeman L. L. Price since July 13, 1949."

FINDINGS: The First Division of the National Adjustment Board, upon the whole record and all the evidence, finds that the parties herein are carrier and employe within the meaning of the Railway Labor Act, as amended, and that this Division has jurisdiction.

Hearing was waived.

If the carrier is to have efficient operations on its railroad, employes must be relied on to obey operating instructions and orders. Claimant was found to have wilfully disobeyed his orders. This was insubordination and merited discipline.

The employe has been tendered reinstatement on a leniency basis but seeks complete vindication on the

grounds that he was denied the investigation provided by the rules of agreement. Thus, the only question for review is whether there was substantial compliance with the investigation rule.

Basically, the complaint is that the hearing was held when the claimant was not present.

The transcript of the hearing shows that at the appointed time and place the employe appeared without a representative. On the carrier being acquainted with the employe's desire to have his representative present and for no other reason assigned by the employe at the time, the hearing was postponed until the following morning by mutual consent. Neither the employe nor his representative appeared the next morning but the employe made written request for additional time "until my representative Mr. E. C. Grounds is in Las Vegas". The hearing was passed to the afternoon of the same day and claimant was notified to appear and be ready to proceed at that time. When he failed to appear the hearing was held in his absence.

The transcript shows that on the date when the hearing was originally set the employe's chosen representative was off duty and as far as we know was in Las Vegas. No reason is assigned for his failure to appear, but his presence would have obviated the need of any postponement for the reason assigned. The employe, in connection with his request for further delay told an officer of the carrier he did not want to proceed with the hearing on the first day because he would have been compelled to pay a material witness for time lost in order to have him present; that since the witness was scheduled

to be off the next day he sought to avoid this expense by asking for the first postponement. We are left to speculate what would have happened if on the day following the hearing the witness was again on duty but the chosen representative was in from his assigned run.

It must be understood that there is no greater sanctity in the investigation rule than any other on the property. All rules are for the aid, guidance, and protection of responsible persons. The right of the employe to be heard before being disciplined is a personal right which he can waive by action, inaction, or failure to act in good faith. He cannot play fast and loose with the rule and expect its strict observance by others who too are accountable for failure to act promptly, justly, and in good faith.

It would have been more to the employe's credit if he had been forthright in the reason assigned for wanting the hearing delayed the first time. Also, his position here would have been strengthened had he personally appeared at all stages of the proceeding to labor as best he could to preserve his record and to get his story to us first hand. All that the transcript reflects does claimant no credit, but leaves us with the feeling that the things of which he now complains were planned by him that way.

AWARD: Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of FIRST DIVISION

ATTEST: (Signed) J. M. McLeod
Executive Secretary

Dated at Chicago, Illinois, this 25th day of June, 1952.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

L. L. PRICE,
Appellant,

vs.

UNION PACIFIC RAILROAD,
Appellee.

No. 15,649
May 20, 1958

Upon Appeal from the United States District Court for the District of Nevada

---

Before: Healy, Pope, and Hamley, Circuit Judges

HAMLEY, Circuit Judge:

L. L. Price brought this action against Union Pacific Railroad Company, to recover damages in the amount of $118,517, alleging that he had been wrongfully dismissed as a trainman.

After the filing of an answer and the obtaining of certain admissions, defendant moved for a summary judgment. The motion was made on the ground that a determination made by the National Railroad Adjustment Board (Board) that the dismissal was valid precluded this independent court action. Agreeing with this view, the trial court granted summary judgment for defendant. Plaintiff appeals.

The single question presented on this appeal is whether, in view of the action of the Board in denying Price's claim for restoration with all rights unimpaired,

and for back pay, the trial court was without jurisdiction to entertain this independent court action for damages.

Price had been employed by the railroad as a brakeman on its South Central District, operating out of Las Vegas, Nevada. On July 12, 1949, he was instructed to deadhead on a 9:15 p. m. train to Nipton, California, a distance of 56.7 miles, for swing service at Nipton. He reached Nipton at 10:25 p. m., and telephoned the Las Vegas train dispatcher. The dispatcher told him to wait at Nipton until 4:00 a. m., at which time he was to serve as a swing brakeman on a train due at that hour.

Price, however, told the dispatcher that there was no place to eat or sleep in Nipton, and that he would return to Las Vegas on the first eastbound train. The dispatcher told Price not to do this, but he nevertheless returned to Las Vegas on a train which reached there at 12:35 a. m., on July 13. After obtaining food in Las Vegas, Price called the train dispatcher and stated that he was ready to return to Nipton on a train due to depart at 1:45 a. m. The dispatcher instructed Price not to return to Nipton.

On July 16, 1949, the railroad charged Price with violating operating rules 700 and 702. He was given written notice at that time to appear for investigation and hearing on these charges at 10:00 a. m., on the following day. Price appeared at the specified time and place, and requested a postponement upon the ground that his union representative was not present. A postponement until 9:30 the following morning was granted.

At this postponed hearing, Price requested a further postponement on the ground that his representative

was still not available. He was then told that the investigation and hearing would be deferred until 2:30 p. m., and was advised to get another representative.

Price did not appear at 2:30 p. m., and a hearing was conducted in his absence. Questions were propounded of various employees by an assistant superintendent, and a record of the proceedings was transcribed. On July 24, 1949, Price was discharged from the service of the carrier.

Price requested the Brotherhood of Railway Trainmen to seek his reinstatement with pay for time lost and all seniority and other rights restored. The Brotherhood negotiated with the railroad, as a result of which the latter offered to take Price back on a leniency basis. Price rejected this offer.

On January 11, 1951, Price's claim for restoration to service with all rights unimpaired and for back pay was submitted by the Brotherhood in behalf of Price, to the Board.[1] On June 25, 1952, the Board issued an award denying Price's claim in its entirety. On June 6, 1953, Price instituted this suit for damages in the District Court of the United States for the District of Nevada. Jurisdiction of the district court is based on diversity of citizenship.

As before indicated, the railroad was granted summary judgment on the ground that the Board award denying Price's claim barred this independent court action for damages. On this appeal, Price argues that a Board award denying the claim of a discharged employee

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1 Pursuant to § 3, First (i) of the Railway Labor Act (act), as amended, 45 U.S.C.A., § 153, First (i).

does not preclude a subsequent independent court action for damages. Alternatively, he argues, if a Board award has such finality, it is only where the Board has made a determination on the merits, and no such determination was made in this case.

Under the act, an employee who believes that he has been wrongfully discharged may petition the Board for a redress of his grievance. Upon the filing of such a petition, the appropriate division of the Board is authorized to conduct a hearing, make findings, and issue an award in writing. If the award is in favor of the petitioner, the Board is to issue an order directing the carrier to make the award effective. If the carrier does not comply, the petitioner may institute an enforcement proceeding in the district court.[2]

Instead of pursuing this administrative remedy, however, an employee may seek relief by way of an independent court action, providing the state law does not require him to first exhaust his administrative remedies.[3] If, however, the aggrieved employee elects to proceed with his administrative remedy, and there obtains an adjudication on the merits, the award is "final and binding" upon both parties to the dispute, except in so far as it shall contain a money award.[4]

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2 Section 3, First (i)-(p) of the act, as amended, 45 U.S.C.A. § 153, First (i)-(p).

3 Moore v. Illinois Central Railroad Company, 312 U. S. 630; Transcontinental & West.Air. v. Koppal, 345 U. S. 653. It is not here contended that the law of Nevada required Price to exhaust the administrative remedy before instituting this court action.

4 Section 3, First (m) of the act, as amended, 45 U.S.C.A., § 153, First (m); Elgin, Joliet & Eastern R. Co. v. Burley, 325 U. S. 711, reargued 327 U. S. 661; Washington Terminal Co. v. Boswell (D.C.Cir.), 124 F.2d 235, affirmed per curiam by an equally divided vote, 319 U. S. 732. That the award must represent an adjudication on the merits in order to be final and binding, see Michel v. Louisville & N. R. Co. (5 Cir.), 188 F.2d 224, 226; Washington Terminal Co. v. Boswell, supra, page 249; Koelker v. Baltimore and Ohio Railroad Co., 140 F. Supp. 887, 889.

When such an award is adverse to the petitioner, he may nevertheless seek review thereof on a ground amounting to a denial of due process of law. Ellerd v. Southern Pacific Railroad Co. (7 Cir.), 241 F. 2d 541. He may not, however, institute an independent court action to recover damages or obtain other relief.

In the present action, Price did not seek a review of the Board award. This is an independent suit for damages. Under the principles stated above, therefore, the court was without jurisdiction to entertain the action if the Board award represents a determination on the merits.

The question on the merits in this controversy is whether, under the terms of employment and the circumstances of this case, the railroad was entitled to discharge Price because of his return from Nipton to Las Vegas contrary to the directions of the train dispatcher. This was one of the two questions which Price submitted for Board determination. The other question which Price submitted to the Board was whether, prior to his discharge, he was accorded the kind of a hearing prescribed in the agreement between the railroad and the Brotherhood governing wages and working conditions.

In denying Price's claim, the First Division of the Board said:

> "If the carrier is to have efficient operations on its railroad, employes must be relied on to obey operating instructions and orders. Claimant was found to have wilfully disobeyed his orders. This was insubordination and merited discipline.
>
> "The employe has been tendered reinstatement on a leniency basis but seeks complete vindication on the grounds that he was denied the investigation provided by the rules of agreement. Thus, the only question for review is whether there was substantial compliance with the investigation rule.

"Basically, the complaint is that the hearing was held when the claimant was not present."

The Board then proceeded to discuss the manner in which the investigation was conducted by the carrier. It was concluded that none of Price's rights in that regard was abridged. The claim was accordingly denied.

It therefore appears that the Board made no determination on the merits of Price's complaint. The Board neither found nor concluded that the railroad was entitled to discharge Price. The written decision of the Board does not even mention this issue other than to report that "claimant was found to have wilfully disobeyed his orders." The finding thus reported was obviously not its own, but that of the superintendent of the railroad.

The reason that the Board did not deal with the merits of the controversy is that it believed, as stated in its decision, that "the only question for review is whether there was substantial compliance with the investigation rule." This was a plain misconstruction of Price's submission to the board, since he had specifically presented the question on the merits.[5]

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5 In the submission to the Board, on behalf of Price, complaint was made of the procedure followed during the railroad's investigation of the incident leading to his discharge. It was then stated:

"The employees further contend that Brakeman Price did not violate any rules of leaving Nipton to secure food. That Brakeman Price was justified in these actions is supported by the provisions of Section (b) of Article 32 of the agreement effective April 1, 1943, reading as follows:

" 'Swing brakemen will not be tied up nor released at points where sleeping and eating accommodations are not available.' "

This statement was followed by a detailed discussion of the reasons why the railroad was not entitled to discharge Price, under the circumstances of this case.

Appellee argues that, if Price believed that the award did not represent a determination on the merits, he could have obtained an interpretation under the "finality" provision of the act.[6]

There was here no dispute "involving an interpretation of the award," as those words are used in the statute. The "award" was an outright denial of the claim,[7] as all parties concede. The statutory provision under which an interpretation of an award may be obtained does not, in our opinion, apply where the only dispute concerns the grounds relied upon in making an unambiguous award.

We conclude that Price did not obtain an adjudication upon the merits in the proceedings before the Board, and that the trial court therefore had juridiction to entertain this independent action for damages.

Reversed and remanded for further proceedings not inconsistent with this opinion.

HEALY, Circuit Judge, Dissenting

I am unable to go along with the holding of my associates that the Board made no disposition of the merits of appellant's complaint.

The Union, in its submission to the Board, admitted that appellant left Nipton and returned to Las Vegas;

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6. The last sentence of § 3, First (m) of the act, as amended, 45 U.S.C.A., § 153, First (m), reads: "In case a dispute arises involving an interpretation of the award, the division of the Board upon request of either party shall interpret the award in the light of the dispute."

7. The Board decision ends with these words: "Award: Claim denied."

and it was not disputed that in doing so he deliberately disobeyed an order of the dispatcher. The Union sought to justify this admitted infraction of an operating order by reference to Section (b) of Article 32 of the Agreement, quoted by my associates in their footnote 5. In disposing of the case the Board, among other things, stated: "If the carrier is to have efficient operations on its railroad, employees must be relied on to obey operating instructions and orders."

It appears to me plain that the Board was of opinion, and in substance held, that the asserted violation by the Company of Article 32, even if true, would not serve to justify an employee's violation of direct operating instructions and his abandonment of his post. Such a ruling would appear to promote safety in railroad operations, which must always take into account considerations of that nature.[1] With its intimate knowledge of the field, the Board is peculiarly equipped to make such a decision.

(Endorsed:) Opinion and Dissenting Opinion. Filed May 20, 1958.

Paul P. O'Brien, Clerk.

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1 Section one of the Railway Labor Act, 45 USCA §151, under subdivision "Fifth" defines "employee" thus:

"The term 'employee' as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) . . ."

Section two of the Act, 45 USCA §151 (a) (1), under the heading "General purposes," states one of its purposes to be:

"to avoid any interruption to commerce or to the operation of any carrier engaged therein; . . ."

APPENDIX C

Judgment

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

L. L. PRICE,
Appellant,

vs.

UNION PACIFIC RAILROAD,
Appellee.

No. 15649

JUDGMENT

Appeal from the United States District Court for the District of Nevada.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Nevada, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the order of the said District Court in this cause be, and hereby is reversed, with costs in favor of the Appellant and against the Appellee, and that this cause be, and hereby is remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court.

IT IS FURTHER ORDERED and adjudged by this Court that the Appellant recover against the Appellee for his costs herein expended and have execution therefor.

(ENDORSED) Judgment
Filed and entered: May 20, 1958
PAUL P. O'BRIEN, Clerk

APPENDIX D

Relevant Statutory Provisions

Section 3 of Title I of the Railway Labor Act, as amended (48 Stat. 1185, 1189; 45 U. S. C. § 153) provides as follows:

"SEC. 3. First. There is hereby established a Board, to be known as the 'National Railroad Adjustment Board', the members of which shall be selected within thirty days after approval of this Act, and it is hereby provided—

"(a) That the said Adjustment Board shall consist of thirty-six members, eighteen of whom shall be selected by the carriers and eighteen by such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of section 2 of this Act.

"(b) The carriers, acting each through its board of directors or its receiver or receivers, trustee or trustees, or through an officer or officers designated for that purpose by such board, trustee or trustees, or receiver or receivers, shall prescribe the rules under which its representatives shall be selected and shall select the representatives of the carriers on the Adjustment Board and designate the division on which each such representative shall serve, but no carrier or system of carriers shall have more than one representative on any division of the Board.

"(c) The national labor organizations as defined in paragraph (a) of this section, acting each through the chief executive or other medium designated by the organization or association thereof, shall prescribe the rules under which the labor members of the Adjustment Board shall be selected and shall select such members and designate the division on which each member shall serve; but no labor organization

shall have more than one representative on any division of the Board.

"(d) In case of a permanent or temporary vacancy on the Adjustment Board, the vacancy shall be filled by selection in the same manner as in the original selection.

"(e) If either the carriers or the labor organizations of the employees fail to select and designate representatives to the Adjustment Board, as provided in paragraphs (b) and (c) of this section, respectively, within sixty days after the passage of this Act, in case of any original appointment to office of a member of the Adjustment Board, or in a case of vacancy in any such office within thirty days after such vacancy occurs, the Mediation Board shall thereupon directly make the appointment and shall select an individual associated in interest with the carriers or the group of labor organizations of employees, whichever he is to represent.

"(f) In the event a dispute arises as to the right of any national labor organization to participate as per paragraph (c) of this section in the selection and designation of the labor members of the Adjustment Board, the Secretary of Labor shall investigate the claim of such labor organization to participate, and if such claim in the judgment of the Secretary of Labor has merit, the Secretary shall notify the Mediation Board accordingly, and within ten days after receipt of such advice the Mediation Board shall request those national labor organizations duly qualified as per paragraph (c) of this section to participate in the selection and designation of the labor members of the Adjustment Board to select a representative. Such representatives, together with a representative likewise designated by the claimant, and a third or neutral party designated by the Mediation Board, constituting a board of

three, shall within thirty days after the appointment of the neutral member investigate the claims of the labor organization desiring participation and decide whether or not it was organized in accordance with section 2 hereof and is otherwise properly qualified to participate in the selection of the labor members of the Adjustment Board and the findings of such boards of three shall be final and binding.

"(g) Each member of the Adjustment Board shall be compensated by the party or parties he is to represent. Each third or neutral party selected under the provisions of (f) of this section shall receive from the Mediation Board such compensation as the Mediation Board may fix, together with his necessary traveling expenses and expenses actually incurred for subsistence, or per diem allowance in lieu thereof, subject to the provisions of law applicable thereto, while serving as such third or neutral party.

"(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

"First division: To have jurisdiction over disputes involving train-and yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees. This division shall consist of ten members, five of whom shall be selected and designated by the carriers and five of whom shall be selected and designated by the national labor organizations of the employees.

"Second division: To have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers, car men, the helpers and apprentices of all the foregoing, coach cleaners, power-house employees, and railroad-shop

laborers. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of the employees.

"Third division: To have jurisdiction over disputes involving station, tower, and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station, and store employees, signal men, sleeping-car conductors, sleeping-car porters, and maids and dining-car employees. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of employees.

"Fourth division: To have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the first, second, and third divisions. This division shall consist of six members, three of whom shall be selected by the carriers and three by the national labor organizations of the empoyees.

"(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

"(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

"(k) Any division of the Adjustment Board shall have authority to empower two or more of its members to conduct hearings and make findings upon disputes, when properly submitted, at any place designated by the division: *Provided, however,* That final awards as to any such dispute must be made by the entire division as hereinafter provided.

"(l) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known as 'referee', to sit with the division as a member thereof and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board shall be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this Act for the appointment of arbitrators and shall fix and pay the compensation of such referees.

"(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective

parties to the controversy and the awards shall be final and binding upon both parties to the dispute, except in so far as they shall contain a money award. In case a dispute arises involving an interpretation of the award the division of the Board upon request of either party shall interpret the award in the light of the dispute.

"(n) A majority vote of all members of the division of the Adjustment Board shall be competent to make an award with respect to any dispute submitted to it.

"(o) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to make the award effective and, if the award includes a requirement for the payment of money, to pay the employee the sum to which he is entitled under the award on or before a day named.

"(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the District in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of

the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board.

"(q) All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after.

"(r) The several divisions of the Adjustment Board shall maintain headquarters in Chicago, Illinois, meet regularly, and continue in session so long as there is pending before the division any matter within its jurisdiction which has been submitted for its consideration and which has not been disposed of.

"(s) Whenever practicable, the several divisions or subdivisions of the Adjustment Board shall be supplied with suitable quarters in any Federal building located at its place of meeting.

"(t) The Adjustment Board may, subject to the approval of the Mediation Board, employ and fix the compensations of such assistants as it deems necessary in carrying on its proceedings. The compensation of such empoyees shall be paid by the Mediation Board.

"(u) The Adjustment Board shall meet within forty days after the approval of this Act and adopt such rules as it deems necessary to control proceedings before the respective divisions and not in conflict with the provisions of this section. Immediately

following the meeting of the entire Board and the adoption of such rules, the respective divisions shall meet and organize by the selection of a chairman, a vice chairman, and a secretary. Thereafter each division shall annually designate one of its members to act as chairman and one of its members to act as vice chairman: *Provided, however,* That the chairmanship and vice chairmanship of any division shall alternate as between the groups, so that both the chairmanship and vice chairmanship shall be held alternately by a representative of the carriers and a representative of the empoyees. In case of a vacancy, such vacancy shall be filled for the unexpired term by the selection of a successor from the same group.

"(v) Each division of the Adjustment Board shall annually prepare and submit a report of its activities to the Mediation Board, and the substance of such report shall be included in the annual report of the Mediation Board to the Congress of the United States. The reports of each division of the Adjustment Board and the annual report of the Mediation Board shall state in detail all cases heard, all actions taken, the names, salaries, and duties of all agencies, employees, and officers receiving compensation from the United States under the authority of this Act, and an account of all moneys appropriated by Congress pursuant to the authority conferred by this Act and disbursed by such agencies, employees, and officers.

"(w) Any division of the Adjustment Board shall have authority, in its discretion, to establish regional adjustment boards to act in its place and stead for such limited period as such division may determine to be necessary. Carrier members of such regional boards shall be designated in keeping with rules devised for this purpose by the carrier members of the Adjustment Board and the labor members shall be designated in keeping with rules devised for

this purpose by the labor members of the Adjustment Board. Any such regional board shall, during the time for which it is appointed, have the same authority to conduct hearings, make findings upon disputes, and adopt the same procedure as the division of the Adjustment Board appointing it, and its decisions shall be enforceable to the same extent and under the same processes. A neutral person, as referee, shall be appointed for service in connection with any such regional adjustment board in the same circumstances and manner as provided in paragraph (l) hereof, with respect to a division of the Adjustment Board.

"Second. Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this Act, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 414

UNION PACIFIC RAILROAD COMPANY,

Petitioner,

vs.

L. L. PRICE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

Questions Presented.

1. Did the National Railroad Adjustment Board determine whether, under the terms of the collective bargaining agreement and the circumstances of the case, the petitioner was entitled to discharge respondent because of his returning from Nipton to Las Vegas to eat?

2. If the National Railroad Adjustment Board did not determine whether the petitioner was entitled to discharge respondent because of his returning to Las Vegas to eat, was the District Court without jurisdiction to hear respondent's action for wrongful discharge?

Statement of the Case.

On July 12, 1949, respondent was a railroad trainman employed by petitioner in Las Vegas, Nevada. On that day he reported for duty at 9:15 P.M. and was instructed to deadhead on a train to Nipton, California, for swing service (extra brakeman) [R. 20].[1]

Article 32(b) of the collective bargaining agreement between petitioner and respondent's brotherhood provided that "Swing brakeman will not be tied up nor released at points where sleeping and eating accommodations are not available" [R. 9].

Respondent arrived at Nipton about 10:25 P.M. [R. 18]. He called the dispatcher in Las Vegas and was told to protect a train which would arrive at Nipton about 4:00 A.M., but to call in about 3:20 A.M. so that if another train was to arrive in time for the 4:00 A.M. train, respondent might be deadheaded back to Las Vegas [R. 17, 18]. Respondent told the dispatcher that there was no place to eat or sleep at Nipton and that he was returning on the first eastbound train to Las Vegas [R. 18].

Shortly after midnight, respondent called the dispatcher and said "I came into Las Vegas to eat. Do you want me to go back out on this MLA to protect the UX connection at Nipton," and was told it would not be necessary [R. 24, 25]. On July 16, 1949, he was notified to report for a hearing the following morning at 10 A.M. at the office of the Assistant Superintendent in Las Vegas for investigation and hearing on charges that he failed to protect his assignment as a swing brakeman at Nipton,

---

[1]Record references are to the printed record.

California, on July 12, 1949, when he returned from Nipton to Las Vegas without authority to eat, in violation of certain operating rules [R. 13].

He appeared and requested a postponement so that he could have his representative, the local chairman of his brotherhood [R. 7] present [R. 14]. A postponement until 9:30 A.M. the following morning was granted [R. 14]. At that time he requested a further postponement on the ground that his representative was still not available, and was advised by the Chief Clerk to the Assistant Superintendent that the hearing would be deferred until 2:30 P.M. that day, and to get another representative [R. 16].

Respondent did not appear at 2:30 P.M. and a hearing was conducted in his absence by the Assistant Superintendent and the trainmaster [R. 12-29]. As a result of the hearing, he was discharged by the petitioner [R. 7]. He thereafter sought reinstatement with no impairment of rights and back pay, but the petitioner refused reinstatement on such basis [R. 29-36].

Subsequently, respondent's brotherhood submitted a claim in his behalf for similar relief to the National Railroad Adjustment Board [R. 5-41], and after petitioner had made its submission to the board, the brotherhood submitted a rebuttal thereto [R. 42-56]. On June 25, 1952, the board denied the claim, and although the brotherhood had argued in its submission and rebuttal that respondent broke no rules in returning from Nipton to Las Vegas for food, and that under the collective bargaining agreement the petitioner had no right to have respondent tied up at Nipton without eating facilities [R. 9-10, 42-46], the board made no findings or comment with respect to the matter [R. 56-59], except to state

that "Claimant was found to have wilfully disobeyed his orders" [R. 57]. In the submission the brotherhood also contended that petitioner had failed to comply with investigation rule contained in the collective agreement [R. 7-9].

On June 6, 1955, respondent filed a complaint in the District Court, alleging that he was wrongfully dismissed as a trainman by petitioner in violation of the provisions of a collective bargaining agreement, and prayed for money damages [R. 3-5]. Petitioner denied the allegations of the complaint and as a separate defense set forth the proceeding before the board and alleged that it constituted a bar to the action [R. 68-72]. Petitioner moved for summary judgment, which motion was denied after argument. Thereafter, petitioner moved for leave to move for summary judgment and for summary judgment [R. 85-90]. Among the exhibits to its motion were respondent's submissions to the board and its award [R. 87, 5-59]. After argument thereon, the District Court granted petitioner's motion [R. 94]. The Court of Appeals for the Ninth Circuit, with Judge Healy dissenting, reversed the judgment of the District Court and remanded the case for further proceedings, 255 F. 2d 663. A petition for rehearing was thereafter filed and denied.

ARGUMENT.

I.

The Board Did Not Pass on the Merits of Respondent's Complaint.

The merits of respondent's submission to the Board was whether under the terms of employment and the circumstances of the case, the petitioner could discharge respondent because of his return from Nipton to Las Vegas to eat. This question was clearly presented to the Board [R. 9, 10, 42-46]. Petitioner does not challenge that this was the merits, but contends that the Board found against respondent on this issue.

Petitioner states (p. 12) that the Board, in its findings, "held that Price's failure to follow orders was 'insubordination and merited discipline.'" The statement is misleading. What the Board said in this regard is as follows:

> "If the carrier is to have efficient operations on its railroad, employes must be relied on to obey operating instructions and orders. *Claimant was found to have wilfully disobeyed his orders.* This was insubordination and merited discipline.
>
> "The employe has been tendered reinstatement on a leniency basis but seeks complete vindication on the grounds that he was denied the investigation provided by the rules of agreement. Thus, the only question for review is whether there was substantial compliance with the investigation rule.
>
> "Basically, the complaint is that the hearing was held when the claimant was not present" [R. 57]. (Emphasis supplied.)

As pointed out by the Court below, the finding reported by the Board with respect to disobedience "was obviously not its own, but that of the superintendent of the rail-

road" who had conducted the investigation. Thus, as the Board did not pass on the issue of whether petitioner could discharge respondent for returning to eat, the Court was correct in holding that the Board failed to pass on the merits of the controversy before it.[2]

II.

The Decision of the Court Below Does Not Conflict With Decisions of Other Courts of Appeal.

1. Petitioner contends that the decision below is in direct conflict with two decisions of the Fifth Circuit, *Majors v. Thompson,* 235 F. 2d 449, and *Woolley v. Eastern Airlines,* 250 F. 2d 86, cert. den., 356 U. S. 931, which are claimed to hold that subsequent court action is precluded by reason of prior Board submission, irrespective of ultimate Board disposition.

In *Majors,* no question of whether the Board had determined the matter on the merits was presented. The only authority cited by the Court on election of remedies was *Michel v. Louisville & N. R. Co.* (5 Cir.), 188 F. 2d 224, cert den., 342 U. S. 862. In that case, the Court, on pages 225 and 226, said:

> "The primary question in the case is whether the voluntary submission of the employee's claim to the Division of the Railroad Adjustment Board having jurisdiction thereof, the prosecution of which was had with the full approval of the employee, and the determination of the claim upon the merits and adverse to the employee's contentions, presented a bar

---

[2]Petitioner's contention that the Court below should not have examined the Board's Findings and the submissions before the Board (p. 18) is strange in view of the fact that the Findings and submissions were petitioner's exhibits in support of its Motion for Summary Judgment [R. 87].

to a subsequent suit upon the same employment contract between the claimant against the carrier in a suit at law for damages . . ."

And as the Board had held that "the dismissal of the Claimant was justified by the showing made," the Court held, page 227, that:

"It follows therefore that in the present case, it appearing from the uncontradicted facts that the question of whether the discharge of the appellant, Michel, was justified, on the one hand, or constituted a violation of the employment agreement on the other, has, in proceedings in effect instituted and prosecuted by appellant, been determined adversely to his contentions, he is therefore not legally entitled to maintain the present suit upon the same claim."

It is noteworthy that the Court below cited *Michel* as authority that an award must represent an adjudication on the merits to be final and binding.

In *Woolley*, the Court quoted from *Majors*, relying on *Michel*, and then went on to say that the decision of the Board that the discharge was proper was fully supported and thus was not reviewable on the merits.

Moreover, *United States v. Oregon Lumber Co.*, 260 U. S. 290, relied on and quoted from by petitioner (p. 8), was not a square holding that an election is made by the mere bringing of a suit, the Court there holding that the election became final by the fact that the United States, in an action to cancel for fraud a patent for public lands, upon ascertaining from defendants' plea that they intended to rely upon the statute of limitations, deliberately chose, instead of abandoning that suit and beginning an action at law where the statute if

limitations would not apply, to proceed with the original case upon the issues as they stood, and to follow it to a final determination. The Court also stated that the determination of the equity action on the basis of statute of limitations was on the merits.

The doctrine of election of remedies was not mentioned in the opinion below. Petitioner claims the Court failed to perceive the applicability of such doctrine (p. 7). Aside from the absence of authority holding the doctrine applicable where the Board has not determined the merits, this claim should be examined in the light of the fact that on the argument below, counsel for petitioner, in answer to a question of the Justice who wrote the opinion, conceded that if the Board had not made a determination on the merits, respondent had a right to maintain his action. The entire case turned on whether or not there had been a determination on the merits. The majority held that it had not, and the dissenting Justice held that the Board had disposed of the merits.

2. The contention that the decision below directly conflicts with decisions of the Courts of Appeals for the Second, Third and Tenth Circuits because it did not hold the award of the Board to be "final and binding" (p. 9) is without merit. The decision below stated that if an "aggrieved employee elects to proceed with his administrative remedy, and there obtains an adjudication on the merits, the award is 'final and binding' upon both parties to the dispute, except in so far as it shall contain a money award," citing *Michel v. Louisville & N. R. Co.* (5 Cir.), 188 F. 2d 224, 226, cert. den., 342 U. S. 862; *Washington Terminal Co. v. Boswell* (D. C. Cir.), 124 F. 2d 235, 249, affd. 319 U. S. 732; *Koelker v. Baltimore and Ohio Railroad Co.*, 140 Fed. Supp. 887, 889.

In *Weaver v. Pennsylvania Railroad Company* (2 Cir.), 240 F. 2d 350, affg. *per curiam*, 141 Fed. Supp. 214, the opinion of the District Court clearly indicates the Board there involved reviewed the merits of the controversy and the District Court itself examined the entire record and expressed the opinion that the discharged employee had been dealt with fairly and properly.

In *Bower v. Eastern Airlines* (3 Cir.), 214 F. 2d 623, 626, the Court specifically stated that Bower "sought and obtained from that Board a decision on the merits of his case."

In *Reynolds v. Denver & R. G. W. R. Co.* (10 Cir.), 174 F. 2d 673, 676, no question as to whether the Board decided the matter on the merits was raised, but the Court found that there had been an adjudication by the Board in favor of the Railroad Company upholding the dismissal of the appellant. Furthermore, the Court concluded that the finding of the District Court that the employee was not wrongfully discharged, but was properly discharged because of his conduct and acts, was supported by the record.

Thus, it is submitted that the decision below is wholly consistent with the above decisions relied on by petitioner to show a conflict.

III.

The Decision Below Will Not Create Litigation.

Despite the large number of wrongful discharge cases reported, there appears to be only one reported case in which any question was raised as to whether or not the Board decided a case of its merits. (*Koelber v. Baltimore and Ohio Railroad Company* (D. C., E. D. Pa.), 140 Fed. Supp. 887.) The absence of other reported

cases involving a similar situation indicates that the situation is an unique one. The decision below will undoubtedly have a salutary effect on the Board and recurrences will be unlikely.

The claim that the decision subjects railroads to a dual liability and "abrogated petitioner's rights under the Railway Labor Act affording either party before the Board the right of Board decision and its 'final and binding' effect" (p. 16) is without merit. Even if the Board had made an award on the merits in favor of respondent, its decision would not have been final, the findings and order being merely *prima facie* evidence of facts therein stated and enforcement of the award made only in a suit *de novo*. (45 U. S. C. A. 153 First (p); *Washington Terminal Co. v. Boswell,* 124 F. 2d 235, 244, affd. 319 U. S. 732.)

Conclusion.

For the foregoing reasons, the petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit should be denied.

Respectfully submitted,

SAMUEL S. LIONEL,

Attorney for Respondent.

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JAMES R. BROWNING, Clerk

No. 414

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REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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Respondent's brief in opposition fails to meet the points raised in support of the petition for certiorari. Additionally, and notwithstanding petitioner's reluctance to burden the Court with any additional material in this matter, the Court's attention should be called to some of the statements made by respondent which may leave an erroneous impression.

ARGUMENT

1. THE STATEMENT ALLEGEDLY MADE BY PETITIONER'S COUNSEL.

In discussing the failure of the court below to apply the doctrine of election of remedies to this situation, respondent goes outside the record herein (p. 8). Apparently from recollection, it is asserted that petitioner's

counsel, in oral argument, conceded respondent's right to maintain the instant court action "if the Board had not made a determination on the merits."

Respondent's assertion cannot be justified from the standpoint of its being factual or proper. While recognizing that this Court should be spared any discussion of matters not of record, it is necessary to state that no such concession was made. The opinion of the court below does not indicate it was aware of any such concession as alleged by respondent. It is reasonable to assume that such a statement, if made, would have been mentoned in the opinion.[1]

2. INTRODUCTION OF SUBMISSIONS AND FINDINGS.

Respondent suggests (footnote 2, p. 6) that in some fashion petitioner was inconsistent in questioning the action of the court below in reviewing the submissions to the Board and the Board's Findings because these documents were its exhibits in support of its motion for summary judgment (R. 87).

As respondent knows, those documents simply showed the fact of his resort to the Adjustment Board and made clear that the identical matter presented to the court in his complaint for wrongful discharge had been presented by him to the Adjustment Board for determination pursuant to the provisions of the Railway Labor Act.

3. THE CONFLICT IN DECISIONS.

Respondent, in arguing that the decision below is not in conflict with *Wooley v. Eastern Airlines*, 250 F. 2d

1 The only concession mentioned in the opinion below was that both parties conceded that the Board's award was an "outright denial of the claim." (Opinion, Appendix B, p. 10a)

86 (C.A. 5), certiorari denied 356 U. S. 931, erroneously states (p. 7) that the court found the discharge was proper and supported and "thus" held the Board decision not subject to review. The court first determined that Wooley was bound by his election, but, noting that the Supreme Court had not passed on this question, deemed it appropriate to discuss other issues which were raised. The court's entire discussion of the propriety of the discharge was made only after it held that the doctrine of election of remedies barred the suit. Moreover, it was prefaced with the statement that "* * * [u]nder our initial determination that the suit could not be maintained, we would of course not reach this question." 250 F. 2d 86, 91, footnote 8.

It is noteworthy that respondent's only comment (p. 6) on the conflict between the decision below and *Majors v. Thompson*, 235 F. 2d 449 (C.A. 5), was that the court there cited its earlier decision in *Michel v. Louisville & N. R. Co.*, 188 F. 2d 224 (C. A. 5). But this does not affect or lessen the conflict between the decision below and *Majors* and we do not understand respondent argues that it does. The *Michel* opinion mentions that the employe's claim had been determined by the Board "upon the merits." This was merely an observation of the court and it is clear from the opinion that it did not consider such to be a factor necessary to its application of the election of remedies doctrine.

Any possibility that the Court of Appeals for the Fifth Circuit considered such to be of any importance is completely dissipated by its opinion in the *Wooley* case[2] where it held that:

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2 The *Wooley* case was decided in *1957*, *Majors* in *1956*, and *Michel* in *1951*.

> "* * * If he [the discharged employe] determines that he will treat his grievance as involving a determination of rights as an employe under the bargaining agreement and asserts his rights to be retained as an employe he must go to the board for redress. If he accepts the action of the carrier as a final discharge he may sue in court for a breach of the contract of employment. *He may not do both.*" (250 F. 2d 86, 91; emphasis and interpolation supplied.)

In an effort to minimize the conflict of the decision below with decisions of other courts of appeals in the application of the "final and binding" provision of Section 3, First (m) of the Railway Labor Act, respondent states (p. 9) that the district court in *Weaver v. Pennsylvania R. Co.*, 240 F. 2d 350 (C.A. 2), affirming 141 F. Supp. 214, examined the record before the Board. Such review was wholly gratuitous and of no moment to its decision that the award was final and binding. The district court in *Weaver* held the Board award "conclusive" and, on the basis of abundant authority which it cited, "doubted" its power "to review the judgment of the System Board of Ajustment." 141 F. Supp. 214, 219.

In spite of his attempts to distinguish the decision below from the decisions of other courts of appeals cited by petitioner, the respondent has been unable to demonstrate that the decision below is not in conflict with those decisions. Additionally, it will be noted that respondent is unable to cite any decision squarely holding that a district court has jurisdiction to review the grounds relied upon by a Board in making a denial award and on the basis of such review nullify or disregard the "final and binding" clause of Section 3, First (m) of the Act. The court below had the same difficulty.

Respondent points to and cites (p. 8) the three decisions relied upon by the court below. In addition to the *Michel* case, *supra*, which has been discussed above and which does not hold that a court has any jurisdiction to review the grounds relied upon in a denial Board award, the court below cited *Washington Terminal Co. v. Boswell*, 124 F. 2d 235, at page 249, affirmed by an equally divided court, 319 U. S. 732. There is nothing at page 249 of the *Boswell* decision which supports the holding below. Moreover, the decision below is in conflict with the basic principles of the *Boswell* case. (See 124 F. 2d 235, at pages 240 and 244.)

Also cited was the case of *Koelker v. Baltimore & O. R. Co.* (E.D., Pa.), 140 F. Supp. 887. This case, however, was not a discharge case (p. 888) and under *Slocum v. Delaware, L. & W. R. Co.*, 339 U. S. 239, the district court was without jurisdiction in the matter. The district court recognized that the plaintiff could only bring a court action under the enforcement provisions of Section 3, First (p) of the Act and that an award in her favor was necessary to such action. The district court did not hold that it had any power to interpret or review the Board award. Instead, it held the case in abeyance to give plaintiff an opportunity to secure such an award or an interpretation under Section 3, First (m) of the Act.

4. THE DECISION BELOW WILL CREATE DISPUTES AND LITIGATION.

Respondent's recognition (p. 9) of the "large number" of wrongful discharge cases supports the petitioner's position that this case should be reviewed. It is asserted that there has been but one reported case (*Koelker v. Baltimore & O. R. Co., supra*) where question

was raised as to whether the Board denied a case on its merits. The question was raised in *Ramsey v. Chesapeake & O. R. Co.* (N. D., Ohio), 75 F. Supp. 740, 742, where the court held the Board award final and binding, notwithstanding that the Board had failed to make specific findings on all issues involved. (See footnote 5, p. 11, Petition.)

That there are few reported cases involving the grounds relied upon in a denial Board award is easily explained. Until the decision below, no other court of appeals decision even purported to sanction the jurisdiction of a court to look behind a denial Board award and determine, review and pass upon the grounds relied upon by the Board in making such award. Moreover, no other court of appeals had failed to apply the election of remedies doctrine or the "final and binding" provision of the Act to a denial Board award in a similar situation.

The decision below greatly increases the probability that this situation will recur, notwithstanding respondent's speculation (p. 10) as to its "salutary" effect. The decision below will furnish the occasion for many discharged employes, who have lost at the Board, to sue in court on the chance of being able to show that the Board failed to pass upon the "merits" of their cases - the courts being given blanket authority to decide what constitutes the merits of such cases.

What may appear to be the "merits" of a dispute to one judge may not be considered to be such by another. Similarly, what may appear to one judge to be a disposition or decision on the merits may appear differently to another judge. In this case, two judges have held that the Board did not pass on what they determined to be

the merits, while two other judges (the District Judge and Circuit Judge Healy) were of the opposite opinion. Accordingly, this decision relegates to the realm of speculation and uncertainty an area which the Act plainly intended should be finally determined by the Board, and thus unsettles something which Congress intended to quiet.

It is submitted that failure of the court below to follow the command of Section 3, First (m) of the Act, and hold the denial award "final and binding", will create disputes and litigation - the very thing Congress sought to avoid by such finality provision.

CONCLUSION

The petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit should be granted.

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November, 1958.

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FILED
JAN 13 1959
JAMES R. BROWNING, Clerk

In the Supreme Court of the United States

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 414

UNION PACIFIC RAILROAD COMPANY,

Petitioner,

v.

L. L. PRICE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONER, UNION PACIFIC RAILROAD COMPANY

OPINION BELOW

The District Court, in granting petitioner's motion for summary judgment (R. 94, 95), issued no opinion. The opinion of the United States Court of Appeals for the Ninth Circuit (R. 101, et seq.) is reported at 255 F. 2d 663. The opinion was rendered on May 20, 1958.

JURISDICTION

The judgment of the Court of Appeals was entered on May 20, 1958 (R. 108). Petition for rehearing was denied on July 7, 1958 (R. 109). The petition for writ of certiorari was filed on October 3, 1958, and was granted on November 17, 1958 (R. 109). On December 10, 1958, the Clerk extended the time for the filing of petitioner's

brief to and including Janary 15, 1959. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1).

QUESTIONS PRESENTED

A discharged railroad employe voluntarily elected to present the dispute over his discharge, seeking reinstatement and back pay, to the National Railroad Adjustment Board under the provisions of Section 3, First (i) of the Railway Labor Act and that Board made an award denying his claim. He did not challenge the validity of the award on any statutory or constitutional basis, nor did he challenge the procedural regularity of the Board's proceedings. Instead, he filed an action for damages for wrongful discharge against the railroad in which he collaterally attacked the Board's denial award. The questions presented are whether in these circumstances -

(1) a district court has jurisdiction to review the grounds relied upon by the Board in making its denial award and, on the basis of such review, qualify, nullify or disregard the express intention of Congress, set forth in Section 3, First (m) of the Act, that Board awards shall be "final and binding upon both parties;" and whether -

(2) the discharged employe may institute an independent action for wrongful discharge in a U. S. District Court or is he bound by his election.

STATUTE INVOLVED

The statute involved is Section 3 of the Railway Labor Act, as amended (45 U. S. C. § 153; 48 Stat. 1185, 1189), the pertinent portions of which are set forth in Appendix A, *infra*, page 1a.

STATEMENT

This is an action for damages for alleged wrongful discharge brought by respondent L. L. Price against petitioner Union Pacific Railroad Company (hereafter referred to as "Union Pacific") in the United States District Court for the District of Nevada. Jurisdiction is based on diversity of citizenship, Price being a citizen of Nevada and Union Pacific, a Utah corporation (R. 3).

The facts are not in dispute. Respondent Price was employed by Union Pacific as a brakeman at Las Vagas, Nevada. On July 12, 1949, he reported for duty at 9:15 p.m. and was instructed to deadhead on a train from Las Vegas to Nipton, California, a point 56.7 miles west of Las Vegas (R. 6). He arrived at Nipton at about 10:25 p.m. at which time he contacted the train dispatcher and was instructed to stay at that point and to perform service as a "swing" or extra brakeman on a train due there in about six hours (R. 17, 18, 20). Price objected to these instructions and told the train dispatcher that there were no eating and sleeping facilities at Nipton and that he was returning on the first eastbound train to Las Vegas (R. 18).

Price's objection to his instructions was based on his own interpretation of a provision, Article 32(b), of the collective bargaining agreement between Union Pacific and the Brotherhood of Railroad Trainmen (hereafter referred to as "Brotherhood") governing the wages and working conditions of brakemen.[1]

1 Article 32(b) provided: "Swing brakemen will not be tied up nor released at points where sleeping and eating accommodations are not available." (R. 9).

Immediately after Price talked with the train dispatcher, the assistant chief train dispatcher came to the telephone and told Price that he should follow his instructions and "handle any grievance [under the agreement] through his organization, as it should be handled." (R. 27, interpolation.) Price deliberately disobeyed his instructions and returned to Las Vegas (R. 24, 25, 27, 28). Some time after his return to Las Vegas he called the train dispatcher and inquired whether he should return to Nipton (R. 24, 25) and was told not to do so (R. 6, 25).

As a result, Union Pacific charged Price with being insubordinate, failing to comply with instructions and being absent from duty without proper authority, in violation of Union Pacific's Operating Rules 700 and 702. He was directed to appear for an investigation and hearing on such charges which would be held under the provisions of the applicable collective bargaining agreement (R. 13).

The investigation was postponed twice at Price's request (R. 12). However, Price never did appear and the investigation was held in his absence (R. 17, 57). A record of the investigation was transcribed (R. 12-29). On July 24, 1949, Union Pacific discharged Price because of his insubordination (R. 3, 7).

Price requested and authorized the Brotherhood to handle the grievance over his discharge and to seek his reinstatement with pay for all time lost and all other rights restored (R. 51). This grievance was handled in the usual manner between Union Pacific and the Brotherhood (R. 29-38). During such handling, Union Pacific, acting in the belief that the discipline had served its purpose, offered to reinstate Price on a leniency basis, i. e.,

restoration with full seniority rights but without pay for time lost (R. 33). This offer was rejected (R. 34) and on January 11, 1951, Price, again acting through the Brotherhood, elected to refer the dispute over his discharge to the First Division of the National Railroad Adjustment Board (R. 5, 60), in accordance with the provisions of Section 3, First (i) of the Railway Labor Act. The claim submitted to the Board sought Price's restoration to service and pay for all time lost from the date of discharge (R. 5).

In support of his claim, Price relied primarily upon two arguments, first, that he was not insubordinate because the instructions to remain at Nipton were in violation of the labor agreement; and, second, that the provisions of the agreement were not complied with because the investigation was held in his absence (R. 8, 9). Other grounds were also urged. For example, Price also contended that the investigation was not "thorough" as required by the agreement (R. 8), and that the agreement was also violated because Union Pacific advised Price in the letter of charges (R. 15) that he could have such witnesses at the investigation as he desired at his own expense (R. 8).

In the handling before the Board, oral hearing was waived by the parties (R. 12, 57). On June 25, 1952, the Board, with A. Langley Coffey sitting as referee, made an award denying Price's claim for reinstatement and back pay (R. 59). This was National Railroad Adjustment Board, First Division Award 15509, and is printed in the record herein at page 56, et seq.

The decision of the Board consisted of a statement of the claim, the findings and the award. The Board's

award, itself, consisted of but two words "Claim denied" (R. 59).

The findings consisted of certain jurisdictional statements followed by a brief statement of the dispute and a recitation of some of the Board's reasons for its award. In the findings, the Board first discussed the question of Price's failure to follow his instructions, stating that Price "was found to have wilfully disobeyed his orders." The Board said "[t]his was insubordination and merited discipline" (R. 57). The Board then said that the agreement had not been violated when the hearing was held in Price's absence (R. 57-59). The findings contained no discussion of any other points advanced by Price in support of his claim.

Price did not take any action challenging the award for any reason. Almost a year later, he filed the complaint in this action alleging wrongful discharge. He alleged that his dismissal was in violation of the agreement between Brotherhood and Union Pacific and that he was discharged without cause. He sought damages in the amount of $118,517.00 (R. 4-5).

In its answer, Union Pacific denied the allegations in the complaint and alleged that the denial award of the Adjustment Board was a "final and binding" determination of the dispute over Price's discharge under Section 3, First (m) of the Railway Labor Act. It was also alleged that his election to pursue the remedy provided by that Act constituted a bar to his action (R. 68-72). Union Pacific filed a motion for a summary judgment (R. 87, 89) which was granted (R. 94-95) and Price appealed therefrom (R. 95).

The Court of Appeals for the Ninth Circuit, with Judge Healy dissenting, reversed the judgment of the District Court and remanded the case for further proceedings, 255 F. 2d 663 (R. 101). The court held that the Board's denial award did not bar Price's action for wrongful discharge. In its opinion, the court below recognized that the Board had issued an award denying Price's claim for reinstatement and back pay in its entirety (R. 103). Nonetheless, the court said that in order for such denial award to be final and binding under the provisions of Section 3, First (m) of the Railway Labor Act, it must represent an "adjudication on the merits." The court then reviewed part of the record before the Board and decided that Price's dispute tendered two questions, first, whether Union Pacific was entitled to discharge Price because of his failure to follow instructions; and, second, whether Price had been accorded the kind of a hearing provided for in the agreement. In the court's view, the first question constituted the "question on the merits in this controversy" (R. 104).

The court then reviewed the Board's findings in an effort to determine the "grounds relied upon" by the Board in making the denial award (R. 106). It held that, while the Board had concluded the applicable agreement provisions were not violated, the Board had misconstrued Price's submission and had not considered or determined the other question presented; that it did not "appear" that the Board made any determination on the "merits of Price's complaint." The court held that because the Board had not passed on what the court determined to be the merits of the dispute, the award was not "final and binding," that the award was without legal effect and that the District Court had jurisdiction to entertain Price's independent action for damages (R. 105).

Judge Healy, in his dissent, stated that it was plain to him that the Board did hold that Price was not justified in violating his instructions and that the Board did dispose of the "merits" of Price's complaint. Judge Healy observed "[w]ith its intimate knowledge of the field, the Board is peculiarly equipped to make such a decision" (R. 107).

Respondent Price did nothing to challenge the validity of the Board's award on any constitutional or statutory basis. His attack on the award was a collateral one. This attack, adopted by the court below as the basis for its decision, was simply that the Board's findings failed to state explicitly that under the facts Union Pacific was entitled to discharge him because of his failure to follow instructions.

SUMMARY OF ARGUMENT

1. The Railway Labor Act at Section 3, First (m) provides that the awards of the National Railroad Adjustment Board shall be "final and binding upon both parties to a dispute" except where they contain a money award. Thus, awards denying a claim represent a final and conclusive determination of the dispute and are not subject to judical review by the courts.

The plain language of the Act, its purpose and legislative history, as well as its uniform application by the courts, deny any jurisdiction in a court to look behind a Board's denial award in a collateral proceeding to determine the grounds relied upon by the Board in its denial. Further, such court is without jurisdiction to decide that the Board failed to consider and pass upon what the court feels were the "merits" of the dispute and on that basis hold that the award should not be "final and binding."

2. Election of remedies bars a discharged railroad employe from litigating his discharge in a common law action for damages after he voluntarily elected to pursue the remedy provided by the Railway Labor Act to a conclusion and lost before the Adjustment Board.

The election was determined by the act of progressing the dispute to the Adjustment Board. Such act, by and of itself, was decisive and barred subsequent resort to the common law remedy irrespective of the nature of the final disposition of the dispute by the Board. This is especially true here where the remedy elected provided by its terms for the conclusive finality of the award.

3. The remedies provided in the Railway Labor Act to judicially review Adjustment Board awards are limited to those provided in the Act. The general rule that the specification of statutory remedies precludes application of other remedies is rigidly applied in the railroad labor field in matters subject to the Railway Labor Act. Courts are given a minimum responsibility in this field and where judicial remedies are not provided, there are none. The only judicial review provided in the Act is in the case of Adjustment Board awards in favor of the petitioning party before the Board.

4. The decision below will have unfortunate and undesirable effects in the administration of the Railway Labor Act. If allowed to stand, it will prolong disputes and result in litigation, thus frustrating the clear intention of Congress to provide an administrative means for the expeditious and conclusive determination of minor grievances in the railroad industry.

To permit the courts to look behind a Board's denial award and speculate as to what constitutes the "merits"

of a dispute and whether the Board gave consideration to such, will encourage resort to the courts by the losing party before the Board. The decision below can only compound confusion by opening to uncertainty those matters which Congress intended to settle by the creation of the National Railroad Adjustment Board.

ARGUMENT

I. AWARDS OF THE NATIONAL RAILROAD ADJUSTMENT BOARD, EXCEPT THOSE CONTAINING A MONEY AWARD, ARE MADE FINAL AND BINDING BY THE RAILWAY LABOR ACT AND ARE NOT SUBJECT TO ANY JUDICIAL REVIEW.

The 1934 amendments to the Railway Labor Act (48 Stat. 1185; 45 U. S. C. § 153), created the National Railroad Adjustment Board and provided for the administrative determination or adjudication of certain disputes between railroads and their employes. The Board is a bi-partisan agency with equal representation of both the railroads and the national labor organizations representing railroad employes.

By Section 3, First (i) of the Railway Labor Act, 45 U. S. C. § 153, First (i), the jurisdiction of the Adjustment Board is limited to what are known in the railroad industry as "minor disputes", i. e., grievances or controversies over the meaning of an agreement provision in a particular fact situation, as distinguished from "major disputes", which, essentially, relate to the making of collective agreements. *Elgin, J. & E. R. Co. v. Burley*, 325 U. S. 711, 722 (1945), affirmed on rehearing, 327 U. S. 661 (1946).

Brief review of the history of the handling of these minor disputes demonstrates that in the establishment of the National Railroad Adjustment Board by the 1934

amendments, Congress intended to create an orderly, certain and conclusive procedure.

Adjustment Boards were created under General Orders Nos. 13, 29 and 53, but these operated only during World War I. See Wolf, The Railroad Labor Board (1927), 50-52. In 1926, the Railway Labor Act (44 Stat. 577) was passed and provided for the establishment of Boards of Adjustment by agreement between railroads, either individually or collectively, and their employes. The Act required that the agreement should provide that the decisions of such Boards would be "final and binding", 44 Stat. 578, Section 3, First (e). But the plan of that Act did not succeed. As indicated, the Boards were to be created by agreement and many carriers would not agree to their establishment.

Finally, in 1934, at the urging of the railroad unions, the Federal Coordinator of Transportation, Joseph B. Eastman, drafted amendments to the 1926 Act which provided, at Section 3, for the creation of the National Railroad Adjustment Board. Either party to a dispute was given the right to refer it to the appropriate division of the Board which was directed to decide such disputes by the making of an award to be final and binding upon the parties.

The 1934 amendments represented a victory for the railroad employes in their efforts to obtain a certain and conclusive method of settling minor disputes through reference to Adjustment Boards established on a national basis. No longer could the settlement of such disputes be defeated by a carrier declining to join in the creation of local Boards of Adjustment. Each party to the dispute may submit it for decision, irrespective of the willingness of the other party. *Elgin, J. & E. R. Co. v. Burley*, 325

U. S. 711, 727 (1945). The creation of the Adjustment Board procedures has been held to preclude a strike over minor disputes pending at the Adjustment Board. In effect, compulsory arbitration was established in this field. *Railroad Trainmen v. Chicago River & I. R. Co.*, 353 U. S. 30, 39 (1957); *State of California v. Taylor*, 353 U. S. 553, 559 (1957).

These minor disputes, after the required handling on the railroad properties, may, if not settled, be referred by either party to the Adjustment Board. Section 3, First (i), 45 U. S. C. § 153, First (i). It is the duty of the Board to agree upon an award in settlement of the dispute. Where agreement is not reached, a neutral person or "referee"[1] is to be selected either by the Adjustment Board or the National Mediation Board. The referee sits with the division and is required to "make an award". Section 3, First (l), 45 U. S. C. § 153, First (l).

Awards of the Adjustment Board, except where they contain a money award, are final and binding upon the parties. In this regard, Congress, with deliberation and obvious purpose, used explicit and unambiguous language:

> "* * * [T]he awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award." Section 3, First (m), 45 U. S. C. § 153, First (m).

Since the establishment of the Adjustment Board in 1934, it has never been doubted that non-money awards[2] of the Board are final and binding and conclusive on the parties. It has been consistently held, except where the

2 A denial award in a case where the claim sought a money payment is not a "money award." *Elgin, J. & E. R. Co. v. Burley*, 325 U.S. 711 (1945), dissenting opinion of Mr. Justice Frankfurter at page 760. *Hargis v. Wabash R. Co.*, 163 F. 2d 608, 614, (C.A. 7, 1947).

validity of such awards are challenged on a statutory or constitutional basis, that the courts are without any power of judicial review thereover. The major reason for this recognition is the explicit and unambiguous provision in the Railway Labor Act at Section 3, First (m) that such awards shall be "final and binding upon both parties to the dispute." In the face of this language, it is impossible to comprehend any other result.

In the *Burley* case, 325 U. S. 711, 720, this Court rejected the argument that Board awards were without legal effect. It was contended that an award of the Board was not a final award but was only advisory. This Court "put aside this broadest contention as inconsistent with the Act's terms, purposes and legislative history." Except where the Act provides for judicial review, the Act "purports to make the Board's decisions 'final and binding'." (325 U. S. at page 727.)

Mr. Justice Rutledge, while on the Circuit Court of Appeals for the District of Columbia, wrote the opinion in *Washington Terminal Company v. Boswell,* 124 F. 2d 235 (1941), affirmed *per curiam* by an equally divided court, 319 U. S. 732 (1942). It was there held that Congress did not intend that Adjustment Board awards "should be circumvented by free resort to other forms of judicial review or determination de novo of the merits of the controversy" (p. 240).

More recently, in *Railroad Trainmen v. Chicago River and Indiana R. Co.,* 353 U. S. 30, 34 (1957), this Court again recognized the "unequivocal'" language of Section 3, First (m), in providing that the awards of the "Board are final and binding upon both parties." It is clear from the Court's opinion that such finality provision of the Act

was essential to its decision holding unlawful a strike over grievances pending before the Board.

Mr. Chief Justice Warren, speaking for a unanimous Court, rejected the Brotherhood's argument that there was no compulsion on the Brotherhood to allow the Board to settle the grievances if an alternative method, e. g., a strike, seemed more desirable. This Court said that the language of Section 3, First "reads otherwise and should be literally applied in the absence of a clear showing of a contrary or qualified intention of Congress." (353 U. S. 30 at page 35.)

Most of the cases in which the Act's finality provision has been applied involve denial Board awards[3] arising generally out of discharge situations. In the typical case, the discharged employe refers the dispute over his discharge to the Adjustment Board seeking reinstatement and back pay. After the Board denies his claim, he brings an action in court. Prior to this Court's decision in *Slocum v. Delaware, L. & W. R. Co.*, 339 U. S. 239 (1950), the relief sought in court was generally the same as that before the Board, namely, for reinstatement and lost pay. Since that decision, it has been limited to damages. Both prior and subsequent to *Slocum*, the courts have rejected any attempt to obtain judicial review of denial Board awards. In most of these cases, such rejection has been on the basis that the "final and binding" provision of the Act precludes any such review. Among these cases are *Reynolds v. Denver & R. G. W. R. Co.*, 174 F. 2d 673 (C. A. 10, 1949); *Weaver v. Penn-*

3 The cases are not limited to awards of the National Railroad Adjustment Board, but also involve awards of System Boards of Adjustment of railroads and airlines established by agreement pursuant to Section 3, Second or 204, Title II of the Railway Labor Act, respectively, such agreements providing, as in Section 3, First (m), that the awards of the Boards would be final and binding on the parties.

sylvania R. Co., 240 F. 2d 350 (C. A. 2, 1957), affirming *per curiam*, 141 F. Supp. 214 (D. C. N. Y., 1956); *Bower v. Eastern Airlines, Inc.*, 214 F. 2d 623 (C. A. 3, 1954), certiorari denied, 348 U. S. 871 (1954); and *Barnett v. Pennsylvania-Reading Seashore Lines*, 245 F. 2d 579 (C. A. 3, 1957).

The *Reynolds* case, 174 F. 2d 673, held the "final and binding" provision of Section 3, First (m) deprived the District Court of jurisdiction in an employe's action for damages brought subsequent to the rendition of a denial award by the Board. The award could not be challenged because the language of the Act was -

> "* * * clear and susceptible only of one construction, namely, that in cases other than where a money award is made the judgment [award] of the Board is final and binding upon the parties thereto." 174 F. 2d 673 at page 675 (interpolation).

The *Bower* case, 214 F. 2d 623, held a discharged airline employe barred from bringing an action at law for damages after an Airline System Board of Adjustment had denied his claim for reinstatement because of the "final and binding" provision of the agreement establishing the Board under Section 204, Title II, of the Railway Labor Act:

> "Whether we say that the party is bound by his own voluntary election between an administrative and an alternative judicial remedy, or describe the party who initiated the administrative proceeding as estopped from denying its agreed final and binding character, or view this as an application of the rationale of *res judicata* in a new area, we are satisfied that the court should declare and enforce a rule of repose against the reexamination of the merits of plaintiff's claim in this case." (214 F. 2d 623 at page 626.)

In *Barnett v. Pennsylvania-Reading Seashore Lines*, 245 F. 2d 579, the plaintiff claimed his discharge violated an agreement to employ him for life. The dispute over his discharge was handled to the First Division of the Adjustment Board where the Board did not even purport to consider the circumstances of his discharge but dismissed it on the basis that the "dispute was settled on the property by and between the parties to the controlling agreement," 245 F. 2d 579 at 580. Plaintiff asked the court to review the Board's decision, contending that the Act was unconstitutional if it were held to provide review for the carrier when the award is in favor of the employe, but no review for the employe when the Board award is in favor of the carrier. This contention was rejected. Judge Goodrich, speaking for the court, said that it was solely up to Congress to prohibit or permit judicial review of non-money Board awards and that the scheme of the Railway Labor Act did not violate constitutional rights. Noting that other courts had based such a conclusion on *res judicata*, as well as the election of remedies doctrine, Judge Goodrich said that there simply was no authority permitting review - "regardless of the path taken judicial authority arrives at the same place" (p. 582).

The operation of the National Railroad Adjustment Board, as well as System Boards of Adjustment, since the passage of the 1934 amendments to the Railway Labor Act and the treatment accorded such Board awards in the cases discussed above,[4] is a necessary recognition of the conclusive finality that Congress intended should apply to these Board decisions and especially, to denial

4 The cases have not been limited to discharge situations. *Hargis v. Wabash Railroad Co.*, 163 F. 2d 608 (C.A. 7, 1947); *Sigfried v. Pan Amer-*

(Continued Next Page)

awards. The decision below would strike in the opposite direction.

Congress told the Adjustment Board to decide these minor disputes - to "make an award." Section 3, First (l). It is the award, the Board's decision, which the Act makes final and binding.

Here, the award of the Board was simply "Claim denied" (R. 59). Instead of recognizing the statutory provision and holding the Board's award "final and binding", the Court of Appeals below reviewed and interpreted not only the Board's findings, but the record of the submissions before the Board as well. (Footnote 5, R. 106.) It acknowledged that the award was an "outright denial of the claim," yet it determined that the Board had "misconstrued" Price's submission and that the Board had failed to discuss, and pass upon, what the court decided was the "merits" of the controversy.

The only requirement in the Act as to awards is that they shall be in writing and copies furnished the parties. Section 3, First (m). Nowhere in the Act is there any requirement that the findings specifically cover every argument advanced in support of a claim; in fact, the Act does not require that findings be made. In *Ramsey v. Chesapeake & O. R. Co.*, 75 F. Supp. 740, 742 (N. D. Ohio, 1948), the court noted that the Board had failed to make specific findings upon all of the facts and issues submitted

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(Footnote 4 Continued)

ican World Airways, 230 F. 2d 13 (C.A. 5, 1956); and *Coats v. St. Louis-San Francisco Railway Co.*, 230 F. 2d 798 (C.A. 5, 1956). State courts have also recognized the finality provisions of the Railway Labor Act. *Stephenson v. New Orleans and North Eastern Railroad Co.*, 180 Miss. 147, 177 So. 509 (1939); *Hicks v. Thompson*, 207 S.W. 2d 1000 (Tex. Civ. App., 1948).

to it, but, nevertheless, held that the denial award was final and binding and precluded any court review.

The decision below is without precedent. No court has held that a District Court has jurisdiction to review the grounds relied upon by an Adjustment Board in making a denial award and, on the basis of such review, invalidate, qualify or disregard the finality provisions of the Act. The court below flatly stated that a Board award, to be final and binding under the Act, "must represent an adjudication on the merits," and cited three cases: *Washington Terminal Co. v. Boswell,* 124 F. 2d 235 at page 249 (1941); *Koelker v. Baltimore & Ohio R. Co.,* 140 F. Supp. 887 at page 889; and *Michel v. Louisville & N. R. Co.,* 188 F. 2d 224 at page 226. (Footnote 4, R. 104.)

Reference was made to page 249 of the decision in the *Boswell* case, which was affirmed by an equally divided court, 319 U. S. 732 (1943). There is nothing at that page touching on the problems involved in the decision below. Moreover, there is actual conflict between the decision below and the principles established in the *Boswell* case which held that a party may not participate in a Board proceeding and then subsequently circumvent the Board's award by judicial proceedings.[5]

In the *Boswell* case, a carrier, after having defended itself unsuccessfully in a dispute referred to the Adjustment Board by the employes, sought to have the Board's

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5 "* * * If a carrier can have full advantage of the administrative proceeding, on the chance it will be successful, yet when the event is otherwise relieve itself of all its disadvantages, circumventing the employee's rights by judicial proceedings in which they are not available, the Railway Labor Act will have become, finally, a dead letter. * * *" 124 F. 2d 235 at page 242.

award and order declared void and requested a declaratory judgment under the involved labor contract within the two-year period which the Act allowed for the successful employe's enforcement suit. The Court of Appeals for the District of Columbia, in a detailed opinion by Mr. Justice Rutledge, held that such an action was not maintainable. The court recognized the action was in essence a suit to review the Board award and it held that such an action was not permitted, that the Act "makes no provision for review as such." The court noted the provisions covering an enforcement action under Section 3, First (p), and concluded that "the method of review provided [in the Act] was intended to be exclusive." (Interpolation, 124 F. 2d at page 240.)

Koelker v. Baltimore & Ohio R. Co., 140 F. Supp. 887 (D. C. Pa., 1956), was a district court opinion. It was not a discipline case. The question, whether the plaintiff had been properly laid off, was submitted to the Third Division of the Board. That Division, unlike the First Division, generally issues an "Opinion of the Board" in addition to findings and an award. The award was not clear. It read "Claim denied in accordance with Opinion and Findings." But in its opinion, the Board indicated that there was no dispute "between parties to the controlling agreement" and the findings said that the Carrier's action "will not be disturbed." (140 F. Supp. 887 at page 889.)

In this situation, the District Court in *Koelker* said there was a dispute over the interpretation of the Board's award and that it would be necessary for one of the parties to request an interpretation from the Board. The court was here referring to Section 3, First (m) which provides for further resort to the Board by the parties in case a dispute arises involving an interpretation of an

award. In the instant case, Union Pacific argued below that Price, if he believed the award did not represent an adjudication on the merits, should have sought an interpretation from the Board. The Court of Appeals below rejected this contention (R. 106).

But the court in *Koelker* did not hold that it had any power to interpret or review the award. It held the case in abeyance to give the plaintiff an opportunity to secure an award in her favor or an interpretation.

The *Koelker* case clearly recognized that the plaintiff could only bring a court action under Section 3, First (p) of the Act and that an award in her favor was necessary to such action. More relevant to the case at bar, the District Court attempted no interpretation or review of the Board award, nor did it allow the law action to be maintained and the effect of the award ignored.

The decision in the *Michel* case (C. A. 5, 1951), 188 F. 2d 224, also cited by the court below, was essentially premised on the doctrine of election of inconsistent remedies which the court said found "strong support" in the finality language of the Act (p. 227). This case is discussed, *infra*, at p. 24, et seq.

The words "final and binding on both parties to the dispute" are so plain in their meaning and indicative of what Congress intended as to make resort to legislative history unnecessary. Nevertheless, the legislative history reinforces that plain meaning.

Commissioner Joseph B. Eastman, Federal Coordinator of Transportation and principal draftsman of the 1934 bill to amend the Railway Labor Act as passed in 1926 testified that the 1926 Act provided that awards of Boards

of Adjustment were to be final and binding and that "[t]hese provisions were regarded, when they were enacted, as a vital and essential part of the act." Hearings before House of Representatives Committee on Interstate and Foreign Commerce on H. R. 7650, 73d Cong., 2d Sess. p. 45. He explained that the 1926 Act had failed to successfully provide a means to settle these minor disputes because of the failure to establish Boards of Adjustment.

Referring to the proposed 1934 amendments, Commissioner Eastman stated:

> "In my answer to you I said there was nothing in the act which provided for the enforcement of those particular decisions. *That answer would not apply to decisions of the adjustment board, and they are made final and binding by the terms of this act, and as I understand it, the labor organizations, none of them, are objecting to that provision. They have their day in court and they have their members on the adjustment board, and if an agreement cannot be reached between the parties representing both sides on the adjustment board, a neutral man steps in and renders the decision, and they will be required to accept that decision when made, with respect to these minor matters.* They are not the major issues which arise in the labor world. It has to do with the settlement of these grievances." (House Hearings, *supra*, p. 59, emphasis supplied.)

In sum, the Court of Appeals below erred in holding that the District Court had jurisdiction to entertain Price's damage action which was a collateral attack on the "final and binding" character of the award of the Adjustment Board. Moreover, it erred in going behind the Board's denial award, reviewing the record before the Board, deciding what it thought to be the "merits" of

the dispute and then deciding on the basis of certain language in the Board's findings, that the Board had not properly considered the dispute over Price's discharge. This erroneous holding of the court below is contrary to the intent and application of the Railway Labor Act.

II. THE VOLUNTARY ELECTION BY A DISCHARGED RAILROAD EMPLOYE TO PURSUE THE ADMINISTRATIVE REMEDY UNDER SECTION 3, FIRST (i) OF THE RAILWAY LABOR ACT BARS SUBSEQUENT RESORT TO THE INCONSISTENT REMEDY OF A COMMON LAW ACTION FOR DAMAGES FOR WRONGFUL DISCHARGE.

In *Moore v. Illinois Central,* 312 U. S. 632, 634, 636 (1941), this Court said that as to actions for wrongful discharge, the 1934 amendments to the Railway Labor Act in effect supplied an administrative remedy to the discharged employe which was in addition to his right to go into court in a common law action for wrongful discharge. Subsequently, the decision in *Slocum v. Delaware, L. & W. R. Co.,* 339 U. S. 239, 244, made clear the election available to the discharged railroad employe. If he still considers himself an employe and asserts his right to be retained as such, he must go to the Board. If he accepts the discharge as final, he may sue in court for breach of contract. But he may not do both. He may proceed "*either* in accordance with the administrative procedures prescribed in his employment contract *or* he may resort to his action at law for alleged unlawful discharge if the state courts recognize such a claim." *T.W.A. v. Koppal,* 345 U. S. 653, 661 (1953; emphasis supplied.) See, also, *Adams v. N. Y. C. & St. L. R. Co.,* 121 F. 2d 808, 810 (C.C.A. 7, 1941).

But the establishment of the administrative remedy did not establish a duality of remedies. The Act provides an alternative remedy to an employe who believes

his discharge was wrongful. The administrative remedy and the common law action for damages for wrongful discharge are mutually exclusive and inconsistent. As the Court pointed out in the *Slocum* case, *supra*, "a common law or statutory action for wrongful discharge differs from any remedy which the Board has power to provide, and does not involve questions of future relations between the railroad and its other employes" (339 U. S. at p. 244). The Court also recognized that the common law action for wrongful discharge requires the employe's acceptance of his discharge as final. Before the Board, he asserts that he still is an employe.

The Court of Appeals in the decision below noted the doctrine of election available to the discharged employe, but failed to apply it (R. 104). The court also recognized that there was not a duality of remedies, although that is the actual result of its decision. It failed to recognize the conclusive effect of the employe's voluntary election to pursue his administrative remedy under Section 3, First (i) of the Railway Labor Act. That election, by and of itself, barred any subsequent attempt to follow the other remedy, irrespective of the ultimate disposition of the dispute by the Board.

One of the earliest cases involving the application of the doctrine of election of remedies to this situation is *Austin v. Southern Pacific Company*, 50 Cal. App. 2d 29[illegible] 123 P. 2d 39 (1942). There the plaintiff, a discharged employe, sought restoration of his seniority through court action following his attempt to present the dispute over his discharge to the National Railroad Adjustment Board. The Board denied him any relief. The California court noted that Austin had an election to

proceed either in a court action or before the Adjustment Board and held that he "made his election and invoked the Board's jurisdiction." This, it was held, barred the subsequent court action.

In *Michel v. Louisville & Nashville R. R. Co.*, 188 F. 2d 224 (C. A. 5, 1951), the prior resort to the Adjustment Board -

> "* * * evidenced an election of inconsistent remedies in that it was an acceptance of one of the two means afforded by law for redress for any grievance or claim arising out of the alleged unjustified discharge * * *" (p. 226)

and barred the bringing of a court action. The court simply applied the fundamental principle that the election of one of two available inconsistent remedies precluded recourse to the other.

As previously indicated, the *Michel* case was relied upon by the court below as authority for its statement that there must be an "adjudication on the merits" in order for a Board award to be final and binding (footnote 4, R. 104). Decision in *Michel* turned on the basis of his election of inconsistent remedies and was not premised on the finality clause of the Act. That case does not hold that the election of inconsistent remedies is inapplicable unless the award is an adjudication on the merits.

We will hereafter show that the court below misconstrued the use of the word "merits" in the *Michel* decision. However, even adopting *arguendo* the court's misunderstanding, it is clear that the mere observation in the *Michel* decision that the employe's claim had been determined by the Board "upon the merits" does not

make such a fact necessary to the application of the election of remedies doctrine. Such a conclusion is unsupported.

Any possibility that the Court of Appeals for the Fifth Circuit considered such to be of relevance in the application of the doctrine of election of remedies is completely dissipated by its subsequent opinions in *Majors v. Thompson*, 235 F. 2d 449 (1956), and *Wooley v. Eastern Air Lines*, 250 F. 2d 86 (1957). In the *Wooley* case, the court rejected, on the basis of election of remedies, an attempted collateral attack on a Board award, holding that the employe could not go to court after he had elected to go to the Board.

> "* * * If he [the discharged employe] determines that he will treat his grievance as involving a determination of rights as an employe under the bargaining agreement and asserts his rights to be retained as an employe he must go to the board for redress. If he accepts the action of the carrier as a final discharge he may sue in court for a breach of the contract of employment. *He may not do both.*" (250 F. 2d 86, 90; emphasis and interpolation supplied).

In the *Michel* case, there was evidence of some reluctance on the part of Michel's union representative to refer the dispute to the Adjustment Board. Footnote 5, 188 F. 2d 224 at page 226. This factor made relevant to that decision the court's observation that the dispute had been "pursued to a determination of the merits by the Adjustment Board" (page 226). In using that language, the court was merely distinguishing between the Board's handling the dispute to a conclusion instead of dismissing it.

In the instant case, the claim presented to the Board sought Price's reinstatement and pay for time lost. The merits of the dispute before the Board was whether or not Price should be reinstated with pay. That was the ultimate question and the Board answered it in the negative. In its unauthorized quest for the "merits," the court below confused Price's arguments in support of his claim with the ultimate question of his reinstatement. But the Adjustment Board necessarily adjudicated the merits of Price's claim for reinstatement by denying it.

The two main contentions relied upon by Price in support of his claim were simply supporting arguments, although one of them did involve the actual circumstances of his discharge. Neither of those two contentions can be properly said to be the "merits" of the claim to the exclusion of the other. Had the Board agreed with Price on any of his arguments, the claim would have been sustained and Price reinstated with back pay.

Petitioner submits that Award 15509, denying Price's claim, was a complete disposition of the dispute. The Board's findings do not show otherwise. It was conceded by all parties and recognized by the court below that Award 15509 was an "outright denial" of Price's claim (R. 106). But, in any event, respondent's argument that the Board had failed to consider one of Price's contentions is irrelevant to the application of the doctrine of election of remedies. Once Price chose to present his case to the Board, he was precluded from his resort to court action. The nature of the final disposition by the Board does not affect the matter.

It has long been recognized that an election to pursue one of two inconsistent remedies precludes resort to the

other without regard to the result of such pursuit. This Court, in *United States v. Oregon Lumber Co.*, 260 U. S. 290, 301 (1922), held that the nature of the final disposition was of no consequence in applying the doctrine of election of remedies:

> "* * * But the election was determined by the bringing and maintenance of the suit, not by the final disposition of the case by the court."

In *Robb v. Vos*, 155 U. S. 13, 43 (1894), this Court reviewed the cases on the question and said that any decisive act determines the election of inconsistent remedies. See, also, *Pennsylvania R. Co. v. Clark Coal Co.*, 238 U. S. 456, 470 (1915); *Minneapolis National Bank v. Liberty National Bank*, 72 F. 2d 434, 436 (C.C.A. 10, 1934); and *Armour & Co. v. Lambdin*, 154 Fla. 86, 16 So. 2d 805, 810 (1944).

Moreover, this case does not present the ordinary election of inconsistent remedies situation. There was here not just the inconsistency of the remedies and the election to follow one of them. Here, Price elected to follow a statutory remedy which, by its own terms, provided the resulting award would be "final and binding," *a fortiori*, such an election must be held effective and conclusive and bars the right to initiate the common law remedy. *Baltimore and Ohio R. Co. v. Brady*, 288 U. S. 448, 458 (1933).

III. JUDICIAL REVIEW OF AN AWARD OF THE ADJUSTMENT BOARD, EXCEPT IN THE MANNER PROVIDED, IS CONTRARY TO THE BASIC THEORY AND PURPOSE OF THE RAILWAY LABOR ACT.

Prior to the 1934 amendments to the Railway Labor Act, the parties were free at all times to go to court to settle their minor disputes or grievances. *Elgin, J. & E.*

R. Co. v. Burley, 325 U. S. 711, 725 (1945). This Court has many times recognized that the passage of the Railway Labor Act was intended to and did in fact necessarily limit the rights of the parties to resort to court actions in bringing about settlement of their minor disputes. *Slocum v. D. L. & W. R. R. Co.*, 339 U. S. 239 (1950); *Order of Railway Conductors v. Southern Railway Co.*, 339 U. S. 255 (1950); *Order of Railway Conductors, et al., v. Pitney, et al.*, 326 U. S. 561 (1946); and *Washington Terminal Co. v. Boswell*, 124 F. 2d 235 (App. D. C. 1941), affirmed *per curiam* 319 U. S. 732 (1943). See, also, *Railroad Trainmen v. Chicago River R. R.*, 353 U. S. 30 (1957) and *State of California v. Taylor*, 353 U. S. 553 (1957).

In the *Pitney* case, *supra*, the Court said that Congress in the Railway Labor Act intended to leave a "minimum responsibility" to the courts. The only provision for judicial review of Adjustment Board awards is with regard to affirmative awards which are in favor of the petitioning party before the Board. If a railroad fails to comply with an award, provision is made for an enforcement action to be brought in a United States District Court. Section 3, First (p).

In the Report of the Attorney General's Committee on Administrative Procedure, it is stated:

> "The judicial review is thus at the instance of the winning party and never at the instance of the losing party, since the only provision is for a suit to enforce the award." The Attorney General's Committee on Administrative Procedure, Railway Labor: The National Railroad Adjustment Board and the National Mediation Board (Monograph No. 17, 1941), p. 13.

This was also the understanding of the railroad labor organizations. In the brief filed in behalf of the Railway Labor Executives' Association with the Attorney General's Committee on Administrative Procedure, the following is found:

> "It must be remembered, however, that the employee claimant, if he loses before the Board has no right to review at all." Collected in Jones, Harry E., Inquiry of the Atty. Gen. Comm. Ad. Proc. Relating to the National Railroad Adjustment Board (1940) at page 355.

The specification by Congress of a particular administrative or judicial remedy has been generally held to be an exclusive procedure. *Wilder Mfg. Co. v. Corn Products Refg. Co.*, 236 U. S. 165, 174 (1915); *United States v. Babcock*, 250 U. S. 328, 331 (1919); *Sunshine Coal Co. v. Adkins*, 310 U. S. 381, 404 (1940); *Switchmen's Union v. Nat. Med. Bd.*, 320 U. S. 297, 301 (1943); and *Yakus v. United States*, 321 U. S. 414 (1944). And where a particular judicial remedy for the review of administrative action has been specified, other remedies are precluded thereby. *Madden v. Brotherhood and Union of Tr. Emp.*, 147 F. 2d 439, 442 (C.C.A. 4, 1945); and *Yakus v. United States, supra.*

The foregoing principles have been most strictly applied to railroad labor disputes and considering the history of the Railway Labor Act, this is not surprising. From the earliest, this Court has emphasized that in railroad labor disputes under the present Railway Labor Act the only manner in which the courts have any jurisdiction is by the specific judicial procedures spelled out in the Act. Except for the judicial remedies there provided, there were to be none.

In the *Switchmen's Union* case, *supra,* that union challenged the certification by the National Mediation Board, under Section 2, Ninth of the Railway Labor Act, of the Brotherhood of Railroad Trainmen as collective bargaining representative of the yardmen on the New York Central. The Switchmen's Union specifically complained of the Board's designating all yardmen to be participants in the election and sought the cancellation of the Board's certificate.

This Court held that the District Court was without jurisdiction to review the Board's action in issuing the certificate and that it was up to Congress to decide whether judicial review should have been provided to protect rights provided under the Act. The Court pointed to the fact that Congress had provided no general provision for judicial review under the Act; that review was provided for in but two situations, in the enforcement of affirmative Board awards and in the enforcement of arbitration awards under Section 9. The Court said:

> "* * * Congress intended to go no further in its use of the processes of adjudication and litigation than the express provisions of the Act indicate." (320 U: S. 297, 302).

To the same effect are *General Committee v. M. K. T. R. Co.,* 320 U. S. 323 (1943) and *General Committee v. Southern Pac. Co.,* 320 U. S. 338 (1943). See, also, *Radio Officers Union v. Nat. Med. Bd.,* 181 F. 2d 801, 802 (C.A. D.C., 1950).

The erroneous action of the court below was premised on an invalid conclusion that the court below had jurisdiction to judicially review and hold the Board award invalid or ineffective. This represents a situation with

reference to the administration of a statute which this Court has repeatedly and uniformly held dictates a minimum judicial function and, except where expressly provided, no function at all.

IV. JUDICIAL REVIEW OF DENIAL ADJUSTMENT BOARD AWARDS CAN LEAD ONLY TO FURTHER DISPUTES AND EXTENSIVE LITIGATION IN RAILROAD LABOR CASES.

United States District Courts, according to the court below, are empowered to inquire into and review the "grounds relied upon" by the Board in making a denial award. Based on such review, the courts are to decide whether the denial award is to be final and binding on the parties depending on what the courts determine to be the "merits" of the dispute submitted to the Board and whether such courts believe the Board considered and passed upon such "merits." Such a holding would nullify the finality provisions of the Act and open the door to judicial review of the merits of Board denial awards, with consequent confusion and litigation. How many times the door will be opened will depend only on the ingenuity of lawyers representing hopeful litigants.

If the decision below is sustained and its principle fully exploited, numerous denial Board awards will be subject to judicial review.[6] In the railroad industry, almost all collective bargaining agreements covering all classes of employes contain provisions prescribing certain time limitations which must be followed in the progression and handling of disputes, including discharge cases, both in the handling on the property and before

6 In this case, respondent Price is given another opportunity after an unsuccessful try at the Adjustment Board and the petitioner will be forced to relitigate a wrongful discharge dispute which is now nine years old.

the Board as well.[7] Many cases involving discharges are progressed to the Board which have not been handled in accordance with the prescribed time limits. Generally, these are denied or dismissed by the Board solely for that reason. In such cases, the Board properly gives no consideration to the circumstances or so-called merits of the discharge.[8] The decision below permits these employes to bring a court action for damages for wrongful discharge.[9]

This case, itself, furnishes an excellent example of the confusion which can and will follow if a District Court has jurisdiction to review the "grounds relied upon" by the Board in making a denial award. In reviewing the Board decision, the court below misunderstood and misconceived the entire meaning of the Board's findings and award in determining that the Board had failed to pass upon what the court conceived to be the "merits" of Price's dispute with Union Pacific.[10] It was this misconception which led to its holding the award to be without legal effect.

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7 See, for example, National Railroad Adjustment Board, First Division Awards 17439, 17611 and 18056. *Atlantic Coast Line R. Co. v. Pope*, 119 F.2d 39 (C.C.A.4, 1941).

8 See awards cited in preceding footnote.

9 This would be true of the discharge case which was one of the 21 grievances before the Board in the *Chicago River* case, 353 U.S. 30, 32. That dispute was decided by the Board on the basis of the time limit provisions of the agreement. First Division, National Railroad Adjustment Board Award 18214. Under the holding below, that award is not "final and binding", yet it was the finality provision which was at the basis of the decision in *Chicago River*, barring a strike over the same grievance.

10 The court below failed to appreciate what Judge Goodrich pointed out in *Kirby v. Pennsylvania R. Co.*, 188 F. 2d 793, 795, 796 (C.A. 3 1951), which was an enforcement action under Section 3, First (p). He said the Board's findings are "a long way from being the neat, definite and precise findings of fact and conclusions of law from the pen of an experienced and conscientious trial judge * * *." But he recognized that it would be "doctrinaire and unrealistic to insist on precise findings of fact."

The Board, in its findings, held that Price's failure to follow orders was "insubordination and merited discipline" (R. 57). The Board could not have made this finding except after considering and rejecting Price's argument that his admitted failure to obey orders was justified. It should be noted that had the Board decided that any one of the contentions advanced by Price in support of his claim was meritorious, the Board would have sustained the claim - awarding Price back pay and reinstatement. Hence, a denial award must be presumed to be a consideration and rejection of all contentions advanced in support of the claim. When the award unambiguously reads "Claim denied," the presumption cannot be rebutted simply by asserting in a collateral attack that the Board's findings are incomplete or unclear, or the result of a misunderstanding on the part of the Board (R. 105).

After disposing of the so-called merit issue, the only remaining question for the Board's review was whether the alleged procedural defect in holding the investigation was sufficient for the Board to disturb the discipline on such grounds. The court's misconception of the Board's decision stems from its attempt to determine what the Board "believed" from a statement made in the findings after the Board had rejected Price's attempted justification for his failure to follow orders that "Thus the only question for review is whether there was substantial compliance with the investigation rule." (R. 57).[11] This statement, the court concluded, showed a

11 This summary disposition of Price's contention that his insubordination was justified must have been made in recognition of the numerous awards of the various divisions of the National Railroad Adjustment Board which hold that in the absence of physical danger, disobedience or refusal to obey instructions is never justified by reason of the em-

(Continued on Next Page)

"misconstruction" of Price's submission to the Board and that the Board had not passed upon what it thought to be the "merit" issue.

It is submitted that this phrase was simply prefatory to the discussion of the alleged procedural defect in the holding of the investigation and does not indicate any failure on the Board's part to consider and pass upon Price's contention that his insubordination was justified. It is a statement that, having found Price's insubordination not justified, the only question left for review by the Board was the alleged agreement violation in the conduct of the hearing.

The Board, in its findings, stated:

> "* * * Claimant was found to have wilfully disobeyed his orders. This was insubordination and merited discipline" (R. 57).

The court below said (R. 105) this language was a conclusion of the superintendent and not the Board. While this was the superintendent's conclusion, that does not mean it was not also the finding of the Board. The fact that the Board included any reference to this aspect of the case demonstrates it was considered. The Board's

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(Footnote 11 Continued)

ployes belief that such instructions violate the provisions of the collective bargaining agreement. For example, First Division, National Railroad Adjustment Board, Award 12877 (Referee George E. Bushnell) holds: "* * * employes may not interpret an agreement in accordance with their own version of its meaning, but must obey orders and then seek redress under the terms of the agreement." See, also, First Division, National Railroad Adjustment Board, Awards 9217 (Referee James H. Wolfe); 16111 (Referee Mart J. O'Malley); 17701 (Referee Thomas C. Begley); and Third Division, National Railroad Adjustment Board, Award 3218 (Referee Edward F. Carter). In this case, the Board said: "If the carrier is to have efficient operations on its railroad, employes must be relied on to obey operating instructions and orders." (R. 57).

failure to evidence any disagreement with the conclusion of the railroad officials, coupled with the denial award, conclusively demonstrates that the Board agreed with, or at least adopted or affirmed, the action of the railroad officials.

This meaning of the award has been substantiated by the Board, itself. On November 26, 1958, at the petitioner's request, the First Division of the Board (with Referee A. Langley Coffey) made an interpretation of Award 15509.[12] The request for an interpretation was filed pursuant to Section 3, First (m) of the Railway Labor Act. A copy of the interpretation is attached as Appendix B. (See *infra*, p. 10a). The Board in its interpretation said:

> "The last sentence of this paragraph reading, 'This was insubordination and merited discipline,' shows the Board considered and rejected the argument that claimant's refusal to follow orders was not insubordination." (*Infra*, p. 11a).

The Board also said in its interpretation that its denial award "indicated" that the Board had considered and rejected every argument in support of the claim on behalf of Price and that such denial award "constituted final disposition of the controversy. * * *" (*Infra*, p. 11a).

What may appear to be the "merits" of a dispute to one judge may not be considered to be such by an-

12 This is not shown in the record herein because the interpretation was rendered after the decision below.

other. For example, the court might have concluded the "merits" of this dispute to be Price's contention that the collective bargaining agreement was violated in that the hearing was not thorough as Price also contended (R. 8). Or it could have decided the "merits" to be the allegation that the agreement was violated with regard to the calling of witnesses (R. 8). Neither of these points was mentioned by the Board in its findings. Under the erroneous approach made by the court below, it could be said that the Board failed to determine the "merits" of the dispute for either of those reasons, as well as for the reason chosen by the court.

Similarly, what may appear to one judge to be a disposition or decision on the merits may appear differently to another judge. In this case, two judges have held that the Board did not pass on what they determined to be the merits, while two other judges (the District Judge and Circuit Judge Healy) were of the opposite opinion. And we have seen what the Board had to say on the matter (Appendix B). The decision below relegates to the realm of speculation and uncertainty an area which the Act plainly intended should be finally determined by the Board, and thus unsettles something which Congress intended to quiet.

CONCLUSION

Petitioner, therefore, respectfully requests this Court to reverse the judgment of the Court of Appeals below and to reinstate the order of the United States District Court for the District of Nevada granting its motion for a summary judgment.

Respectfully submitted,

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January, 1959.

APPENDIX A

Relevant Statutory Provisions

Section 3 of Title I of the Railway Labor Act, as amended (48 Stat. 1185, 1189; 45 U. S. C. § 153) provides as follows:

"SEC. 3. First. There is hereby established a Board, to be known as the 'National Railroad Adjustment Board', the members of which shall be selected within thirty days after approval of this Act, and it is hereby provided—

"(a) That the said Adjustment Board shall consist of thirty-six members, eighteen of whom shall be selected by the carriers and eighteen by such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of section 2 of this Act.

"(b) The carriers, acting each through its board of directors or its receiver or receivers, trustee or trustees, or through an officer or officers designated for that purpose by such board, trustee or trustees, or receiver or receivers, shall prescribe the rules under which its representatives shall be selected and shall select the representatives of the carriers on the Adjustment Board and designate the division on which each such representative shall serve, but no carrier or system of carriers shall have more than one representative on any division of the Board.

"(c) The national labor organizations as defined in paragraph (a) of this section, acting each through the chief executive or other medium designated by the organization or association thereof, shall prescribe the rules under which the labor members of the Adjustment Board shall be selected and shall select such members and designate the division on which each member shall serve; but no labor organization

shall have more than one representative on any division of the Board.

"(d) In case of a permanent or temporary vacancy on the Adjustment Board, the vacancy shall be filled by selection in the same manner as in the original selection.

"(e) If either the carriers or the labor organizations of the employees fail to select and designate representatives to the Adjustment Board, as provided in paragraphs (b) and (c) of this section, respectively, within sixty days after the passage of this Act, in case of any original appointment to office of a member of the Adjustment Board, or in a case of vacancy in any such office within thirty days after such vacancy occurs, the Mediation Board shall thereupon directly make the appointment and shall select an individual associated in interest with the carriers or the group of labor organizations of employees, whichever he is to represent.

"(f) In the event a dispute arises as to the right of any national labor organization to participate as per paragraph (c) of this section in the selection and designation of the labor members of the Adjustment Board, the Secretary of Labor shall investigate the claim of such labor organization to participate, and if such claim in the judgment of the Secretary of Labor has merit, the Secretary shall notify the Mediation Board accordingly, and within ten days after receipt of such advice the Mediation Board shall request those national labor organizations duly qualified as per paragraph (c) of this section to participate in the selection and designation of the labor members of the Adjustment Board to select a representative. Such representatives, together with a representative likewise designated by the claimant, and a third or neutral party designated by the Mediation Board, constituting a board of three,

shall within thirty days after the appointment of the neutral member investigate the claims of the labor organization desiring participation and decide whether or not it was organized in accordance with section 2 hereof and is otherwise properly qualified to participate in the selection of the labor members of the Adjustment Board and the findings of such boards of three shall be final and binding.

"(g) Each member of the Adjustment Board shall be compensated by the party or parties he is to represent. Each third or neutral party selected under the provisions of (f) of this section shall receive from the Mediation Board such compensation as the Mediation Board may fix, together with his necessary traveling expenses and expenses actually incurred for subsistence, or per diem allowance in lieu thereof, subject to the provisions of law applicable thereto, while serving as such third or neutral party.

"(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

"First division: To have jurisdiction over disputes involving train- and yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees. This division shall consist of ten members, five of whom shall be selected and designated by the carriers and five of whom shall be selected and designated by the national labor organizations of the employees.

"Second division: To have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers, car men, the helpers and apprentices of all the foregoing, coach

cleaners, power-house employees, and railroad-shop laborers. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of the employees.

"Third division: To have jurisdiction over disputes involving station, tower, and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station, and store employees, signal men, sleeping-car conductors, sleeping-car porters, and maids and dining-car employees. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of employees.

"Fourth division: To have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the first, second and third divisions. This division shall consist of six members, three of whom shall be selected by the carriers and three by the national labor organizations of the employees.

"(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

"(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any dispute submitted to them.

"(k) Any division of the Adjustment Board shall have authority to empower two or more of its members to conduct hearings and make findings upon disputes, when properly submitted, at any place designated by the division: *Provided, however,* That final awards as to any such dispute must be made by the entire division as hereinafter provided.

"(l) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known as 'referee', to sit with the division as a member thereof and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board shall be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this Act for the appointment of arbitrators and shall fix and pay the compensation of such referees.

"(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective

parties to the controversy and the awards shall be final and binding upon both parties to the dispute, except in so far as they shall contain a money award. In case a dispute arises involving an interpretation of the award the division of the Board upon request of either party shall interpret the award in the light of the dispute.

"(n) A majority vote of all members of the division of the Adjustment Board shall be competent to make an award with respect to any dispute submitted to it.

"(o) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to make the award effective and, if the award includes a requirement for the payment of money, to pay the employee the sum to which he is entitled under the award on or before a day named.

"(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the District in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue

upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions of law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board.

"(q) All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after.

"(r) The several divisions of the Adjustment Board shall maintain headquarters in Chicago, Illinois, meet regularly, and continue in session so long as there is pending before the division any matter within its jurisdiction which has been submitted for its consideration and which has not been disposed of.

"(s) Whenever practicable, the several divisions or subdivisions of the Adjustment Board shall be supplied with suitable quarters in any Federal building located at its place of meeting.

"(t) The Adjustment Board may, subject to the approval of the Mediation Board, employ and fix the compensations of such assistants as it deems necessary in carrying on its proceedings. The compensation of such employees shall be paid by the Mediation Board.

"(u) The Adjustment Board shall meet within forty days after the approval of this Act and adopt such rules as it deems necessary to control proceedings before the respective divisions and not in con-

flict with the provisions of this section. Immediately following the meeting of the entire Board and the adoption of such rules, the respective divisions shall meet and organize by the selection of a chairman, a vice chairman, and a secretary. Thereafter each division shall annually designate one of its members to act as chairman and one of its members to act as vice chairman: *Provided, however,* That the chairmanship and vice chairmanship of any division shall alternate as between the groups, so that both the chairmanship and vice chairmanship shall be held alternately by a representative of the carriers and a representative of the employees. In case of a vacancy, such vacancy shall be filled for the unexpired term by the selection of a successor from the same group.

"(v) Each division of the Adjustment Board shall annually prepare and submit a report of its activities to the Mediation Board, and the substance of such report shall be included in the annual report of the Mediation Board to the Congress of the United States. The reports of each division of the Adjustment Board and the annual report of the Mediation Board shall state in detail all cases heard, all actions taken, the names, salaries, and duties of all agencies, employees, and officers receiving compensation from the United States under the authority of this Act, and an account of all moneys appropriated by Congress pursuant to the authority conferred by this Act and disbursed by such agencies, employees, and officers.

"(w) Any division of the Adjustment Board shall have authority, in its discretion, to establish regional adjustment boards to act in its place and stead for such limited period as such division may determine to be necessary. Carrier members of such regional boards shall be designated in keeping with rules devised for this purpose by the carrier mem-

bers of the Adjustment Board and the labor members shall be designated in keeping with rules devised for this purpose by the labor members of the Adjustment Board. Any such regional board shall, during the time for which it is appointed, have the same authority to conduct hearings, make findings upon disputes, and adopt the same procedure as the division of the Adjustment Board appointing it, and its decisions shall be enforceable to the same extent and under the same processes. A neutral person, as referee, shall be appointed for service in connection with any such regional adjustment board in the same circumstances and manner as provided in paragraph (l) hereof, with respect to a division of the Adjustment Board.

"Second. Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this Act, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board."

APPENDIX B

NATIONAL RAILROAD ADJUSTMENT BOARD
First Division

With Referee A. Langley Coffey

INTERPRETATION

Award 15 509
Docket 27 393

Parties to Dispute { Brotherhood of Railroad Trainmen
Union Pacific Railroad Company (South-Central District)

INTERPRETATION

Upon application of the carrier involved in the above award, this Division is requested to interpret the same by reason of a dispute involving its interpretation. Specificially, the dispute concerns itself with the consideration given by the Division, in disposing of the case with an award reading "Claim denied", to the various contentions or arguments advanced by or on the claimant's behalf.

Claimant, through his counsel, challenges the "power" of this Division to interpret Award 15 509 and asserts that "no dispute exists with respect to said award." The Board notes, however, that the factual statements in carrier's petition showing the existence of a dispute are not challenged. After full consideration of the matter, the Division finds that a dispute exists as to the interpretation or meaning of the above award and Section 3, First, (m) of the Railway Labor Act clothes the Division with full power and the duty to interpret the award in "the light of the dispute."

The submissions and arguments to the Board in this matter raised two main questions; first, was Claimant Price's refusal to follow instructions justified and, hence, not insubordination and, second, were the provisions of the controlling agreement violated in that the investigation was held in Price's absence?

The claimant has taken the position that the Board's denial award in this matter represented a ruling only on his contention as to the procedural violation and was not based on any consideration of his contention that his action was not insubordination.

The third paragraph of our Findings reads as follows:

> "If the carrier is to have efficient operations of its railroad, employees must be relied on to obey operating instructions and orders. Claimant was found to have wilfully disobeyed his orders. This was insubordination and merited discipline."

The last sentence of this paragraph reading, "This was insubordination and merited discipline", shows the Board considered and rejected the argument that claimant's refusal to follow orders was not insubordination.

Our denial award indicated that the Board had considered and rejected every argument advanced in support of the claim of wrongful discharge and it was our decision that the carrier's action was proper and should not be disturbed. Our denial of the claim constituted final disposition of the controversy submitted in the above docket.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of FIRST DIVISION

ATTEST: /s/ J. M. MACLEOD
Executive Secretary

Dated at Chicago, Illinois.
This 26th day of November 1958.

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MAR 18 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1958

No. 414

UNION PACIFIC RAILROAD COMPANY,

Petitioner,

vs.

L. L. PRICE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENT, L. L. PRICE.

SAMUEL S. LIONEL,
300 Fremont Street,
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Attorney for Respondent.

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IN THE

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October Term, 1958
No. 414

UNION PACIFIC RAILROAD COMPANY,

Petitioner,

vs.

L. L. PRICE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENT, L. L. PRICE.

Questions Presented.

1. Does the denial by the National Railroad Adjustment Board of a claim for reinstatement and back pay by a discharged railroad employee preclude a court suit for damages by such employee?

If question 1 is answered in the affirmative, then a second question is presented as follows:

2. If the National Railroad Adjustment Board in denying the claim misconstrued it and did not decide it upon the merits, may the discharged employee file a court suit for damages?

Statement of the Case.

On July 12, 1949, respondent L. L. Price was a railroad trainman employed by petitioner Union Pacific Railroad Company in Las Vegas, Nevada. On that day Price reported for duty at 9:15 P.M. and was instructed to deadhead on a train to Nipton, California, for swing service (extra brakeman) [R. 20].[1]

Article 32(b) of the collective bargaining agreement between the railroad and Price's brotherhood provided that "Swing brakeman will not be tied up nor released at points where sleeping and eating accommodations are not available" [R. 9]. There was no place for trainmen to eat at Nipton from 8:00 P.M. to 6:00 A.M. [R. 45-46].

Price arrived at Nipton about 10:25 P.M. [R. 18]. He called the dispatcher in Las Vegas and was told to protect a train which would arrive at Nipton about 4:00 A.M., but to call in about 3:20 A.M. so that if another train was to arrive in time for the 4:00 A.M. train, he might be deadheaded back to Las Vegas [R. 17-18]. Price told the dispatcher that there was no place to eat or sleep at Nipton and that he was returning on the first eastbound train to Las Vegas [R. 18]. Shortly after midnight, Price called the dispatcher and said "I came into Las Vegas to eat. Do you want me to go back out on this MLA to protect the UX connection at Nipton," and was told it would not be necessary [R. 24-25].

Commencing June 28, 1949, the railroad required swing brakemen to detrain at Nipton. Nipton was a station in desert terrain, infested with scorpions, rattlesnakes and other insects [R. 55]. Before that time the brakemen had

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[1]Record references are to the printed record.

been detrained at Kelso, California, where eating and sleeping accomodations were available [R. 43]. This action was vigorously protested by the trainmen as being violative of Article 32(b) [R. 43], and on July 6, 1949, Price's brotherhood caused to be docketed an application for mediation with the National Mediation Board [R. 38]. As a result, and on July 15, 1949, the brotherhood and the railroad entered into an agreement whereby swing brakemen would be detrained at Kelso instead of Nipton [R. 38-41, 43].

On July 16, 1949, Price was notified in writing by the assistant superintendent, W. B. Groome, that he was suspended and to report the following morning at 10 A.M. at his office in Las Vegas for investigation and hearings on charges that he refused to protect his assignment as a swing brakeman at Nipton, California, on July 12, 1949, when returned from Nipton to Las Vegas to eat, in violation of certain operating rules [R. 12-13].

Price appeared the following morning and requested a postponement until July 18 because his witness, a brakeman, was called to work by the railroad at 10 A.M. July 17, and Price did not want to pay him to lay off to attend as his witness [R. 24].[2] A postponement until 9:30 A.M. the following morning was granted [R. 14]. At that time Price appeared and requested a postponement until his representative, E. C. Grounds, the local chairman of his brotherhood [R. 14], was present in Las Vegas [R. 16]. Grounds, who worked for the railroad, had departed from Las Vegas the previous night at 8 o'clock [R. 23]. Groome, the assistant superintendent, directed Price to

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[2]The notice to Price stated "You may produce such witnesses as you may desire, at your expense."

appear at 2:30 P.M. that day and to get another representative [R. 16-17].

Price did not appear at 2:30 P.M. and Groome ordered the investigation and hearing to proceed without him [R. 17]. Thereupon, he and the trainmaster conducted the same [R. 12-29]. With the exception of the statements of S. M. Smith, Groome's clerk, with respect to Price's requests for postponement [R. 16-17, 23-24], the hearing dealt solely with Price's return from Nipton to Las Vegas for the purpose of eating [R. 12-29]. There apparently was no verbatim transcript of what occurred. All that exists is a series of brief questions and answers prepared by Groome's clerk for the signatures of witnesses [R. 12-29].

Article 33 of the collective agreement enjoined the fixing of punishment "without a thorough investigation" [R. 7]. Nevertheless, the so-called transcript indicates that each of the witnesses were called as witnesses for the railroad [R. 16-17, 19, 24, 26]. And at the end, it recites that Groome said, "As Brakeman Price, with his representative, did not appear at this investigation as directed there is no one present to present evidence or witnesses in his behalf. The investigation is closed . . ." [R. 29].

As a result of the hearing, Price was discharged by the railroad [R. 7]. He thereafter sought reinstatement with no impairment of rights and back pay, but the railroad refused reinstatement on such basis [R. 29-36].

Thereafter, Price's brotherhood submitted a claim in his behalf for similar relief to the National Railroad Adjustment Board. The submission argued (1) that the railroad ignored Article 33 by holding the hearing when it knew Price's representative was not available and requir-

ing him to pay his own witness, and (2) that Price was justified in leaving Nipton for food because of Article 32(b). The response of the railroad is not part of the record, but the rebuttal of the brotherhood deals primarily with the Article 32(b) issue, answering points raised in the railroad's response with respect to such issue [R. 42-56].

On June 25, 1952, the board made written findings, wrote an opinion, and denied the claim [R. 56-59]. However, it made no findings or comment with respect to Article 32(b) or Price's return to Las Vegas for food, except to state that "Claimant was found to have willfully disobeyed his orders" [R. 56-59].

On June 6, 1955, Price filed a complaint in this action alleging wrongful discharge in violation of a collective bargaining agreement, and prayed for money damages [R. 3-5]. The railroad denied the allegations of the complaint and as a separate defense set forth the proceeding before the board and alleged that it constituted a bar to the action [R. 68-72]. The railroad moved for summary judgment, which motion was denied after argument. Thereafter, the railroad moved for leave to move for summary judgment and after argument the motion was granted.

The Court of Appeals for the Ninth Circuit, with Judge Healy dissenting, reversed the judgment of the District Court and remanded the case for further proceedings, 255 F. 2d 663 [R. 101]. The railroad's petition for rehearing was denied [R. 109].

Summary of Argument.

This Court has not ruled whether or not Section 3 First (m) of the Railway Labor Act (45 U. S. C. 153 First (m)), which provides that awards of the National

Railroad Adjustment Board "shall be final and binding upon both parties to a dispute except so far as they shall contain a money award," precludes a discharged railroad employee, whose claim for reinstatement has been denied by the board, from pursuing his common law remedy for damages by court suit. Such ruling was expressly reserved in *Elgin, Joliet and Eastern R. Co. v. Burley* (1945), 325 U. S. 711, 718.

There is nothing in the legislative history of the 1934 Amendments to the Railway Labor Act, where the "final and binding" language appears, to evince an intent on the part of Congress that the exhaustion of the act's administrative remedy results in the loss of the employee's right to sue in court for damages. In *Moore v. Illinois Central R. R.* (1941), 312 U. S. 630, it was held that there was nothing in the act to take away from the courts jurisdiction to determine a controversy over the wrongful discharge of a railroad employee.

The act should not be construed so as to make the awards "final and binding" and bar court action by a discharged employee who lost before the board, because such a construction would result in unfairness and a denial of due process in that (1) it would deny an employee who lost before the board access to the courts and permit an employer who lost before the board the right to defend an enforcement suit in a proceeding *de novo;* (2) the proceedings before the board do not have adequate procedural safeguards; and (3) valuable contract rights would be taken by a non-governmental agency vested with full judicial power.

And even assuming an award of the board adverse to a discharged employee was "final and binding," if the board misconstrued the complaint of the employee and

did not determine it on its merits, the employee may pursue his common law action. As the board did misconstrue respondent's complaint and did not determine it upon the merits, he was not barred from bringing this action, and summary judgment should not have been granted.

ARGUMENT.

I.

A Determination by the National Railroad Adjustment Board That a Discharged Railroad Employee Was Not Entitled to Reinstatement Does Not Preclude the Employee From Suing in Court for Damages for Wrongful Discharge.

A. The "Finality" Provision of the Railway Labor Act Does Not Preclude Price's Suit.

Section 3, First (m) of the Railway Labor Act (45 U. S. C., Sec. 153, First (m)) provides that the awards of the National Railroad Adjustment Board "shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award." The railroad contends the "final and binding" language of the section precludes Price's suit.

This Court has not ruled on whether or not the finality language makes the award of the board conclusive in a case of this nature. In *Elgin, Joliet & Eastern R. Co. v. Burley* (1945), 325 U. S. 711, 718, this Court recognized the existence of the question, but as it remanded the case it deemed it unnecessary to resolve the question.

> ". . . We do not reach the questions of finality, which turn upon construction of the statutory provisions and their constitutional validity as construed. Those questions should not be determined unless the award was validly made, which presents, in our opinion, the crucial question . . ."

In *Moore v. Illinois Central R. R.* (1941), 312 U. S. 630, 634, the railroad contended that the plaintiff could not bring an action for wrongful discharge in a state court until he had first exhausted the administrative proceeding provided under the Railway Labor Act (45 U. S. C. 153). In holding the exhaustion doctrine inapplicable, this Court said:

> ". . . We find nothing in that Act which purports to take away from the courts the jurisdiction to determine a controversy over a wrongful discharge or to make an administrative finding a prerequisite to filing a suit in court."

How can the railroad's contention here be reconciled with this Court's language in the *Moore* case? Would not a holding that the "finality" language deprived the District Court of jurisdiction be a holding that Section 153, First (m) does take away the power of courts to decide a wrongful discharge claim and that *Moore* did not mean what it said? It is true that *Moore* was principally an exhaustion doctrine case, but the language and meaning are clear.

Even *Slocum v. Delaware, L. & W. R. Co.* (1950), 339 U. S. 239, which narrowed the possible broad scope of *Moore* by holding that the board had exclusive primary jurisdiction of grievances between a railroad and its employees requiring interpretation of collective agreements, said its decision was not inconsistent with its holding in *Moore* that the Railway Labor Act does not bar courts from adjudicating a suit claiming damages for wrongful discharge.

> ". . . As we there held, the Railway Labor Act does not bar courts from adjudicating such cases. A common law or statutory action for wrongful dis-

charge differs from any remedy which the Board has power to provide, and does not involve questions of future relations between the railroad and its other employees . . . ."

The railroad argues that the legislative history supports its contention and quotes a statement made by Commissioner Joseph B. Eastman (p. 21) with respect to proposed 1934 amendments to the Railway Labor Act. Respondent submits that the statement does not support the railroad's position. There is nothing in it indicating an intent to bar a discharged employee from prosecuting a claim for damages in court. Rather the statement is part of the legislative history of the 1934 amendments referred to by this Court in *Railroad Trainmen v. Chicago River & Indiana Railroad Company*, 353 U. S. 30, to reinforce its literal interpretation of Section 153 First (m) that either a railroad brotherhood or a carrier could submit a dispute to the board and the other side would be bound by the award.

In *Slocum v. Delaware, L. & W. R. Co., supra*, Mr. Justice Reed, in his dissent (pp. 246-247) stated:

". . . There is not a line in the statute, and so far as I can ascertain, not a suggestion in the hearings that the creation of the Adjustment Board was intended by Congress to close the doors of the courts to litigants with otherwise justiciable controversies."

In *Washington Terminal Co. v. Boswell* (1941), 124 F. 2d 235, affirmed *per curiam* by an equally-divided court, 319, U. S. 732 (1942), Justice Stephens, who wrote the dissent, stated, after reviewing the legislative history that (p. 269).

"It would seem more logical to conclude that it could hardly have been the intention of Congress to

exclude either the employees or the carrier from recourse to the courts for a determination of their contract rights, whether or not they lost before the board . . ."

In *T. W. A. v. Koppal* (1953), 345 U. S. 653, a discharged employee of an air carrier did not appeal to company officials as required by the collective agreement. He filed suit in District Court and recovered a verdict. The District Court set the verdict aside and entered judgment for the carrier on the ground that plaintiff had not exhausted the administrative remedy provided in the contract and as required by Missouri law. The judgment was reversed by the Eighth Circuit and this Court reversed the Eighth Circuit, holding that if applicable state law requires exhaustion of administrative remedies under his employment contract he must show that he has done so before bringing an action for damages for wrongful discharge.

How can *T. W. A. v. Koppal,* be reconciled with the railroad's contention? *Moore* holds that exhaustion of the administrative remedy provided by the Railway Labor Act is not a prerequisite to court action for damages due to wrongful discharge. *Koppal* holds that if local law requires exhaustion, a discharged employee must take his case to the board before going to court. If the railroad is right and a board's determination adverse to an employee is final and deprives courts of power to award damages to the employee, an employee required to exhaust the administrative remedy has no court to take his case after pursuit of his administrative remedy. The railroad can hardly contend that in enacting the 1934 amendments to the Act Congress intended that board determinations adverse to discharged employees should be "final and binding"

and deprive courts of power to determine a wrongful discharge suit only if the discharged employee was not required by applicable state law to exhaust his administrative remedies.

In the *Washington Terminal* case, *supra*, employees had submitted their claim to the board and the carrier appeared and made a full submission on the merits. The board made an award in favor of the employees, who were members of two unions, holding that under their collective bargaining agreement they were entitled to do the work previously done by others. The board ordered the carrier to make the award effective within thirty days. The carrier did not comply, and thereafter filed suit for declaratory relief, seeking adjudication of its rights under the agreement, including whether the agreement, if rightly interpreted, gave the employees the right to do the work in dispute. The carrier also sought an adjudication that the award and order were void. In a two to one decision, the majority held that declaratory relief did not lie and the method of review set forth in the act, namely an enforcement suit by the employees (45 U. S. C. 153, First (p)) was the exclusive method of review.

The carrier had claimed a denial of constitutional rights, because the administrative proceeding did not comply with due process requirements. In answering this contention, the majority said that this would be important if the board's decision was final in the legal sense. However, as the decisions were not final, but the findings and order merely *prima facie* evidence of facts therein stated and enforcement of the award made only in a suit *de novo*, the argument that the administrative proceedings were wanting in due process was cured by the full and complete opportunity given to the carrier in an enforcement

suit to make its defense under all procedural and substantive guaranties of the Constitution.

The carrier further contended that the act balanced the scales of justice unevenly by permitting employees to sue and not giving carriers the same right. In answering this contention, Justice Rutledge clearly recognized that if the "finality" provision was applied literally to a case in which an award was unfavorable to an employee, it might be invalid. At pages 245 and 246, he said:

> "If the statute creates inequality in this respect, it is perhaps the other way. When an award is unfavorable to an employee, the statute makes no provision for him to challenge it by suit to set it aside or otherwise. So far as appears from the Act's explicit terms, the Board's decision is final. We need not determine whether the statute is conclusive in this respect or, if so, whether it would be so far invalid. In other words, the question is not before us whether an employee can maintain a suit for relief independent of the statute and of the award, after he has submitted his case to the Board and received its adverse decision. That the statute, if applied literally in this respect, might be invalid as to the employee and that he might thereafter have independent relief, does not mean that it would be invalid as to the carrier or that it should have such relief from the Board's adverse decision. Their situations are entirely different and so are the effects upon their rights of the award and of absence of opportunity to institute suit to review it. The employee's rights would be foreclosed, if the award against him were final. The employer's position, on the other hand, is much different."

The *dicta* in the *Washington Terminal* decision should be read in the light of the recent holding of this Court

in the *Brotherhood of Railroad Trainmen v. Chicago River and Indiana Railroad Company* (1957), 353 U. S. 30, that under the Railway Labor Act, if the parties are unable to reach an agreement with respect to their dispute, either party may refer it to the board, irrespective of the willingness of the other.

Thus, unless a discharged employee refuses to even have his case handled in the usual manner for the purpose of seeing whether an agreement can be reached, and instead sues at once under the *Moore* decision, the railroad can submit the matter to the board even though the employee is unwilling to do so, and if petitioner's contention is correct, an adverse board decision will be the end of the employee's claim. The end result is that unless a discharged employee sues, without attempting to settle the dispute, the railroad can assure itself of two opportunities to have the matter determined in its favor. It can submit the matter to the board and if it prevails, it can contend the determination is "final," and if it loses, it can refuse to pay any money award and defend an enforcement suit by the employee in a suit *de novo* in which the findings of the board would be merely *prima facie* evidence of the facts therein stated. (45 U. S. C. 153 First (p); *Washington Terminal Co. v. Boswell, supra* at 244.)

Congress could not have intended such a patently unfair situation to exist, particularly in view of the fact that the board ". . . consists of a people chosen and paid, not by the Government, but by groups of carriers and large international unions . . . There is no process for compelling the attendance of witnesses or the production of evidence. There is no official record, other than that of the informal pleadings. Hearings are conducted without witnesses. The Board has operated without giving individuals

a chance to be heard unless they were represented by unions." (*Slocum v. Delaware, supra,* dissent, pp. 251, 252.) And if it did, would not such unfairness deprive a discharged railroad employee of his contract rights created under the collective agreement in violation of the due process clause? Surely the denial of judicial review under such circumstances to a defeated employee, but not to a defeated railroad, is manifestly grossly unfair. And if this was the law, would a discharged railroad employee, if he were cognizant of it, attempt to settle his dispute without a law suit, unless he were forced to do for pecuniary reasons? Surely Congress intended to prevent litigation, not to foster it, when it enacted the 1934 amendments.

In *Dahlberg v. Pittsburgh & L. E. R.* (C. A. 3, 1943), 138 F. 2d 121, the question of the finality of an award was presented to the Third Circuit. Employees there brought an action in the district court to enforce an order of the board which, by the board's interpretation of the contract between the carrier and the employees, gave seniority rights to the employees. The carrier urged that the construction of the contract by the board was clearly wrong and the court should refuse to enter an order of enforcement, while the employees contended that the board order was final and binding on the parties and the court was not authorized to review it. The District Court held that the board's interpretation was erroneous and dismissed the complaint. In affirming the dismissal, the court, at page 122, said:

> "In construing a statute, words may not be taken out of their context and endowed with an absolute quality nor may the plan of the entire statute be disregarded in interpreting any single provision. Obviously the expression 'final and binding' has its limitations. Even the appellants concede that the award is

neither so final that it may not be set aside by the Court if the Board acted beyond its statutory authority nor so binding that the carrier can be compelled to obey it without the aid of the Court in enforcement proceedings. We think that the general plan of the statute discloses an intention to use the words in the sense that the award is the definitive act of a mediative agency, binding until and unless it is set aside in the manner prescribed, and that it was intended that the Court should exercise broader powers than merely directing coercive process to issue if satisfied that the proceeding was authorized by law."

And on page 123, the Court continued as follows:

"If the Act should be interpreted as precluding consideration of the merits by the Court, serious doubts as to its constitutionality would arise. Such interpretation would amount to vesting the Board with full judicial power; and, as was said in a similar but other connection in the dissenting opinion in Washington Terminal Co. v. Boswell, 75 U. S. App. D. C. ; 124 F. 2d 235, 276, 'There can be no valid delegation of governmental power to non-governmental agencies.' Carter v. Carter Coal Co., 1936, 298 U. S. 238, 56 S. Ct. 855, 80 L. Ed. 1160. The Adjustment Board, consisting of bi-partisan group paid by and set up to represent the employees and carriers respectively, is not a governmental agency.

"If it could be assumed that the Adjustment Board was a governmental agency still other doubts as to the Act's constitutionality would be present, for example, the question whether there is such a lack of safeguards in the procedure before the Board as to amount to a denial of due process, there being no court review of the merits. This point was dealt with by Justice Rutledge in the Washington Terminal Co.

v. Boswell, supra, as follows: 'Much of the argument has been built around the alleged inadequacy of the administrative proceeding as complying with the requirements of due process, particularly in the absence of formal pleadings, opportunity for examining witnesses and cross examining them, opportunity for representation by counsel and for oral argument. These things would be important, if the Board's decisions were final in the legal sense and for purposes of enforcement, as to either facts or law. But, as has been shown, they have no such quality.'

"The reason for the choice of the words 'final and binding' will appear from the history of legislation providing for mediation of railway labor disputes. Under both the act of May 20, 1926, 45 U.S.C.A. §§ 151 et seq. and the Transportation Act of 1920, 41 Stat. 456, as well as the system of labor mediation which was created during the first world war when the railroads were under federal control, the board had advisory powers only. See Pennsylvania R. Co. v. United States Railroad Labor Board, 261 U. S. 72, 43 S. Ct. 278, 67 L. Ed. 536. Under the Act of 1926 their awards could be given some practical effect, but only by stipulation. These provisions were not entirely successful and it is plain that the words in question adopted by the framers of the Act of 1934 makes the decisions of the Board more efficacious than mere private advice. In this, however, there cannot be found an intention to invest them with the force of unappealable decisions."

The railroad cites four lower court decisions as authority for holding the finality language precludes this action. *Reynolds v. Denver & R. G. W. R. Co.* (C. A. 10, 1949), 174 F. 2d 673; *Weaver v. Pennsylvania R. Co.* (C. A. 2, 1957), 240 F. 2d 350, affirming *per curiam,* 141 Fed. Supp.

214; *Bower v. Eastern Airlines, Inc.* (C. A. 3, 1954), 214 F. 2d 623; and *Barnett v. Pennsylvania-Reading Seashore Lines* (C. A. 3, 1957), 245 F. 2d 579.

In *Reynolds v. Denver & R. G. W. R. Co., supra,* an engineer sued for reinstatement, damages for lost wages, and restoration of seniority rights. The Tenth Circuit said that the words "final and binding" were clear and could only be construed to mean final and binding and it was without power to grant the relief sought.[3] However, the Court must have entertained doubts, because despite so holding, the Court first did examine into and "carefully analyzed" the evidence submitted in the trial court and concluded that the finding of the District Court that the employee was not wrongfully discharged because of his conduct and acts, was supported by the record.

In *Weaver v. Pennsylvania R. Co., supra,* the finality clause of the Railway Labor Act was not involved, but rather the disputes clause of a collective agreement which provided that the decisions of the system board "shall be final and binding upon all parties to the dispute." And although the District Court expressed doubt as to whether or not it had power to review the judgment of the system board, it nevertheless examined the entire record and expressed its firm conviction that the plaintiff had been dealt with fairly and properly.

In *Bower v. Eastern Airlines, supra,* the disputes clause in a collective agreement, similar to the one involved in the *Weaver* case, was in issue, and the Court held that the decision of the system board was final because of the

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[3]Under *Slocum v. Delaware,* 339 U. S. 239, decided almost a year after *Reynolds,* it would seem that the board's jurisdiction to grant the relief sought was exclusive.

agreement of the contracting parties. Of significance here is the statement of the Court that plaintiff "sought and obtained from that Board a decision on the merits of his case."

In *Barnett v. Pennsylvania-Reading Seashore Lines, supra*, the plaintiff sought, through an injunctive order, reinstatement and compensation for loss of earnings and pension rights. Although under *Slocum v. Delaware, L. & W. R. Co.* (1950), 339 U. S. 239, the board would have exclusive jurisdiction and the District Court so held, 145 Fed. Supp. 731, the Third Circuit held that plaintiff was not entitled to "challenge the decision reached by the Board on the merits of the plaintiff's claim," because of the decisions, some of which relied on the finality clause, one on *res judicata* and some on election of remedies. The Court did not say upon which theory it relied.

In *Barnett*, the employee contended that if the act was construed to make the award conclusive, it would violate the Fifth Amendment by denying judicial review to defeated employees though allowing it to defeated employers. The Court said that if Barnett had been bound to submit his claim to the board there would be discrimination, but as he was not bound to do so there was no violation of constitutional rights. If the Court in *Barnett* had known that the railroad could submit the controversy to the board, despite the unwillingness of the employee (*Brotherhood of Railroad Trainmen v. Chicago River and Indiana Railroad Company, supra*), it might very well have decided that the act was unconstitutional if an employee who lost before the board was thereafter barred from court.

It is the contention of respondent that the remedy created by Section 3 of Title 1 of the Railway Labor Act is merely an administrative remedy and a discharged em-

ployee, under the *Moore* decision need not exhaust it unless he desires to do so or exhaustion is required under local law. (*T. W. A. v. Koppal, supra.*) That if a discharged employee does exhaust the remedy, he may thereafter sue for damages, and the only matters ruled on by the board that are "final and binding" are those which involve questions of future relations between the railroad and its employees, and which are within the exclusive primary jurisdiction of the board. (*Slocum v. Delaware, L. & W. R. Co., supra.*)

B. The Doctrine of Election of Remedies Is Not Applicable.

The railroad (pp. 22, 23) has pounced upon some of the language in *Slocum v. Delaware, L. & W. R. Co.*, 339 U. S. 239, and *T. W. A. v. Koppal*, 345 U. S. 653, and upon that basis appears to contend that this Court intended to make the doctrine of election of remedies applicable to the situation here present.

In *Slocum*, it was held that a state court did not have power to adjudicate a dispute between a railroad and a labor union involving the interpretation of collective agreements as to their scope because the Railway Labor Act conferred exclusive jurisdiction upon the board to determine such dispute. In its opinion the Court distinguished the *Moore* case by stating merely that a common law action for wrongful discharge did not involve questions of future relations between the railroad and its other employees, and therefore the board did not have exclusive jurisdiction over a wrongful discharge controversy. The case did not hold or even discuss any question with respect to an election, although it did, in a footnote (7) indicate that its decision was to have no implications with respect to "judicial proceedings to review board action or inaction."

T. W. A. v. Koppal, supra, held that where local law required exhaustion, a discharged railroad employee was required to take his case to the board before filing a suit in court. No question of election was presented to the Court or discussed. All the Court did, after stating that local law required exhaustion, was to quote from *Moore* that the Railway Labor Act did not take away from the courts the jurisdiction to determine a wrongful discharge suit or to make an administrative finding a prerequisite to filing a suit in court, quote its amplification of the *Moore* statement in the *Slocum* opinion, and hold exhaustion was necessary.

It is submitted that this Court in both *Slocum* and *Koppal* did not intend, by stating that Moore could pursue either the administrative remedy or sue in court for damages, to make the election doctrine apply. The issue of election of remedies was not before the Court in either case. To hold that a person who exhausts an administrative remedy has made an irrevocable election, and he is thereby precluded from seeking relief in court, would result in greater confusion with respect to the doctrine of exhaustion of administrative remedies than now exists.

Aside from decisions dealing with the Railway Labor Act, the railroad has cited two cases only in which it was held that the pursuit of the administrative remedy was an election. (*Pennsylvania R. Co. v. Clark Coal Co.* (1915), 238 U. S. 456, and *Baltimore and Ohio R. Co. v. Brady* (1933), 288 U. S. 448.) In both cases it was held that there was an election because of the specific language of Section 9 of the Interstate Commerce Act (49 U. S. C. 9)

which provides that a complaint can be made to the Interstate Commerce Commission or by suit for damages, but not both. And the fact that Congress, in enacting the 1934 Amendments to the Railway Labor Act, did not use language of similar import, in respondent's view, lends considerable support to his position that no election was intended or should be held to exist.

With respect to the cases decided by lower courts under the Railway Labor Act, and cited by petitioner as authority for the election doctrine, each of which will be referred to in Point II hereof, except *Austin v. Southern Pacific Company* (1942), 123 P. 2d 39,[1] respondent desires to point out that they rely upon the "final and binding" language to make the board's ruling final so as to invoke the election of remedies doctrine. (*Michel v. Louisville & Nashville R. R. Co.* (C. A. 5, 1951), 188 F. 2d 224, 226, 227; *Majors v. Thompson* (C. A. 5, 1956), 235 F. 2d 449, 452; *Woolley v. Eastern Air Lines* (C. A. 5, 1957), 250 F. 2d 86, 90, 92.)

Accordingly, if the "finality" language of the act is not entitled to the construction contended for by the railroad, it would seem that the premise upon which the above cited decisions rely, disappears and as a result the railroad has failed to cite any authority for holding that the exhausting of an administrative remedy is an election except where the statute creating the administrative remedy so provides.

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[1]In *Austin v. Southern Pacific Co.*, the Court first found that the complaint failed to allege a cause of action on grounds separate and distinct from election of remedies.

II.

Assuming That Section 3 First (m) of the Railway Labor Act Should Be Construed So as to Accord "Finality" to a Determination That an Employee Was Not Discharged in Violation of Provisions of a Collective Bargaining Agreement, the National Railroad Adjustment Board Made No Determination.

The merits of respondent's submission to the board was whether under the terms of the collective agreement and the circumstances of the case, the railroad could discharge Price because of his return from Nipton to Las Vegas for the purpose of eating. This question was clearly presented to the board [R. 9, 10, 42-46]. The railroad does not appear to challenge that this was the merits, except to argue that what "may appear to be the 'merits' of a dispute to one judge may not be considered to be such by another" [R. 35, 36]. However, the railroad contends that the board found against Price on the issue.

In denying the claim, the board said:

> "If the carrier is to have efficient operations on its railroad, employes must be relied on to obey operating instructions and orders. *Claimant was found to have wilfully disobeyed his orders.* This was insubordination and merited discipline.
>
> "The employe has been tendered reinstatement on a leniency basis but seeks complete vindication on the grounds that he was denied the investigation provided by the rules of agreement. *Thus, the only question for review is whether there was substantial compliance with the investigation rule.*
>
> "Basically, the complaint is that the hearing was held when the claimant was not present." [R. 57.] (Emphasis supplied.)

Nothing else was said by the board with respect to the issue of Price's return to eat. Under the circumstances, is it any wonder that the Court below stated:

> "It therefore appears that the Board made no determination on the merits of Price's complaint. The Board neither found nor concluded that the railroad was entitled to discharge Price. The written decision of the Board does not even mention this issue other than to report that 'claimant was found to have wilfully disobeyed his orders.' The finding thus reported was obviously not its own, but that of the superintendent of the railroad.
>
> "The reason that the Board did not deal with the merits of the controversy is that it believed, as stated in its decision, that 'the only question for review is whether there was substantial compliance with the investigation rule.' This was a plain misconstruction of Price's submission to the board, since he had specifically presented the question on the merits." [R. 105, 106.]

Assuming Section 3 First (m) is entitled to the construction claimed by the railroad, should the determination of the board under the circumstances of this case be held to deprive Price of his valuable contract rights? Here Price was suspended by the assistant superintendent and ordered to report the following morning for investigation and hearing [R. 12, 13]. A one day postponement was granted, and when a further postponement was asked so that Price's representative could be present, the assistant superintendent granted one for five hours only, and told him to get another representative [R. 16, 17]. When Price did not appear, the assistant superintendent ordered the hearing to proceed [R. 17], called only witnesses for the railroad [R. 16, 17, 19, 24, 26], and closed the hearing

without seeking evidence or witnesses in Price's behalf [R. 29]. There is no transcript of the proceedings. The only record is a series of brief questions and answers prepared by the clerk of the assistant superintendent [R. 12-29].

Should a finding of disobedience by the assistant superintendent only under such circumstances deprive Price of his common law remedy to sue for wrongful discharge?[5]

In almost every wrongful discharge decision cited by the railroad in which the board decision was held to be final or the doctrine of election of remedies involved, the court indicated that the board determined the case on the merits or the court itself agreed with the findings of the board that the employee was properly discharged. See discussion of *Reynolds v. Denver & R. G. W. R. Co., Weaver v. Pennsylvania R. Co., Bower v. Eastern,* and *Barnett v. Pennsylvania, supra,* under respondent's Point I, A.

In *Michel v. Louisville & N. R. Co.* (C. A. 5, 1951), 188 F. 2d 224, 225, 227, the plaintiff brought an action for wrongful discharge against a carrier, claiming the discharge constituted a violation of the collective agreement. The Court, on pages 224 and 225, said:

> "The primary question in the case is whether the voluntary submission of the employee's claim to the Division of the Railroad Adjustment Board having jurisdiction thereof, the prosecution of which was had with the full approval of the employee, and the determination of the claim upon the merits and adverse to the employee's contentions, presented a bar

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[5]It is entirely possible that the peremptory disposition of the matter by the assistant superintendent was the result of the controversy between the railroad and Price's brotherhood over the detraining of swing brakemen at Nipton [R. 38-41, 43].

to a subsequent suit upon the same employment contract between the claimant against the carrier in a suit at law for damages . . ."

As the board had held that "the dismissal of the Claimant was justified by the showing made," the Court held, page 227, that:

> "It follows therefore that in the present case, it appearing from the uncontradicted facts that the question of whether the discharge of the appellant, Michel, was justified, on the one hand, or constituted a violation of the employment agreement on the other, has, in proceedings in effect instituted and prosecuted by appellant, been determined adversely to his contentions, he is therefore not legally entitled to maintain the present suit upon the same claim."

Majors v. Thompson (C. A. 5, 1956), 235 F. 2d 449, cited *Michel* as authority for holding the decision of the board final and an election present. And in *Woolley v. Eastern Airlines* (C. A. 5, 1956), 250 F. 2d 86, the Court quoted from *Majors*, relying on *Michel*, and then went on to state that the decision of the board was final and binding, but that if this view was untenable, it nevertheless found that on the record the finding of the District Court that the decision of the board was fully supported and thus was not reviewable on the merits was correct.

And in *Kelley v. N. C. & St. Louis Ry.* (E. D. Tenn., 1948), 75 Fed. Supp. 737 (not relied on by petitioner), a discharged locomotive engineer sued for wrongful discharge. The defendant railroad moved for summary judgment on the ground that the plaintiff had voluntarily carried his claim before the Railroad Adjustment Board to final hearing and the board had the matter under ad-

visement. In granting the motion for summary judgment, the Court stated:

> "This adjudication is made with the understanding that the plaintiff has a petition and record before the Adjustment Board to which the defendant has appeared and made defense, all to the end that the Adjustment Board has taken jurisdiction to and will determine the grievance upon its merits. The plaintiff must have a hearing on the merits, either before the Board or in this court . . ."

Petitioner relies upon *United States v. Oregon Lumber Co.* (1922), 260 U. S. 290, as holding that an election occurs without regard to the result of the first proceeding. Not only were two judicial remedies involved in that case, but the Court there held that the election became final by the fact that the United States, in an action to cancel for fraud a patent for public lands, upon ascertaining from defendants' plea that they intended to rely upon the statute of limitations, deliberately chose, instead of abandoning that suit and bringing an action at law where the statute of limitations would not apply, to proceed with the original case upon the issues as they stood and to follow it to a final determination. The Court also stated that the determination of the equity action on the basis of statute of limitations was on the merits.

The railroad sets forth in Appendix B to its brief an interpretation of its award made November 26, 1958, five and a half years after its original award. This interpretation was made upon the request of the railroad, despite the fact that the Court below stated there "was here no dispute 'involving an interpretation of the award' as those words are used in the statute" [R. 106].

The respondent submits that he is entitled to have his case determined on the merits in the District Court.

Conclusion.

For the reasons stated herein, the respondent respectfully prays that the judgment of the Court of Appeals below be affirmed.

Respectfully submitted,

SAMUEL S. LIONEL,

Attorney for Respondent.

APPENDIX A.

Relevant Statutory Provisions.

Section 3 of Title I of the Railway Labor Act, as amended (48 Stat. 1185, 1189; 45 U. S. C. § 153) provides as follows:

"SEC. 3. First. There is hereby established a Board, to be known as the 'National Railroad Adjustment Board', the members of which shall be selected within thirty days after approval of this Act, and it is hereby provided—

"(a) That the said Adjustment Board shall consist of thirty-six members, eighteen of whom shall be selected by the carriers and eighteen by such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of section 2 of this Act.

"(b) The carriers, acting each through its board of directors or its receiver or receivers, trustee or trustees, or through an officer or officers designated for that purpose by such board, trustee or trustees, or receiver or receivers, shall prescribe the rules under which its representatives shall be selected and shall select the representatives of the carriers on the Adjustment Board and designate the division on which each such representative shall serve, but no carrier or system of carriers shall have more than one representative on any division of the Board.

"(c) The national labor organizations as defined in paragraph (a) of this section, acting each through the chief executive or other medium designated by the organization or association thereof shall prescribe the rules under which the labor members of the Adjustment Board shall be selected and shall select

such members and designate the division on which each member shall serve; but no labor organization shall have more than one representative on any division of the Board.

"(d) In case of a permanent or temporary vacancy on the Adjustment Board, the vacancy shall be filled by selection in the same manner as in the original selection.

"(e) If either the carriers or the labor organizations of the employees fail to select and designate representatives to the Adjustment Board, as provided in paragraphs (b) and (c) of this section, respectively, within sixty days after the passage of this Act, in case of any original appointment to office of a member of the Adjustment Board, or in a case of vacancy in any such office within thirty days after such vacancy occurs, the Mediation Board shall thereupon directly make the appointment and shall select an individual associated in interest with the carriers or the group of labor organizations of employees, whichever he is to represent.

"(f) In the event a dispute arises as to the right of any national labor organization to participate as per paragraph (c) of this section in the selection and designation of the labor members of the Adjustment Board, the Secretary of Labor shall investigate the claim of such labor organization to participate, and if such claim in the judgment of the Secretary of Labor has merit, the Secretary shall notify the Mediation Board accordingly, and within ten days after receipt of such advice the Mediation Board shall request those national labor organizations duly qualified as per paragraph (c) of this section to participate in the selection and designation

of the labor members of the Adjustment Board to select a representative. Such representatives, together with a representative likewise designated by the claimant, and a third or neutral party designated by the Mediation Board, constituting a board of three, shall within thirty days after the appointment of the neutral member investigate the claims of the labor organization desiring participation and decide whether or not it was organized in accordance with section 2 hereof and is otherwise properly qualified to participate in the selection of the labor members of the Adjustment Board and the findings of such boards of three shall be final and binding.

"(g) Each member of the Adjustment Board shall be compensated by the party or parties he is to represent. Each third or neutral party selected under the provisions of (f) of this section shall receive from the Mediation Board such compensation as the Mediation Board may fix, together with his necessary traveling expenses and expenses actually incurred for subsistence, or per diem allowance in lieu thereof, subject to the provisions of law applicable thereto, while serving as such third or neutral party.

"(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

"First division: To have jurisdiction over disputes involving train- and yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees. This division shall consist of ten members, five of whom shall be selected and

designated by the carriers and five of whom shall be selected and designated by the national labor organizations of the employees.

"Second division: To have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers, car men, the helpers and apprentices of all the foregoing, coach cleaners, power-house employees, and railroad-shop laborers. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of the employees.

"Third division: To have jurisdiction over disputes involving station, tower, and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station, and store employees, signal men, sleeping-car conductors, sleeping-car porters, and maids and dining-car employees. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of employees.

"Fourth division: To have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the first, second and third divisions. This division shall consist of six members, three of whom shall be selected by the carriers and three by the national labor organizations of the employees.

"(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application

of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

"(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any dispute submitted to them.

"(k) Any division of the Adjustment Board shall have authority to empower two or more of its members to conduct hearings and make findings upon disputes, when properly submitted, at any place designated by the division: *Provided, however,* That final awards as to any such dispute must be made by the entire division as hereinafter provided.

"(l) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known as 'referee,' to sit with the division as a member thereof and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the divi-

sion, or any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board shall be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this Act for the appointment of arbitrators and shall fix and pay the compensation of such referees.

"(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy and the awards shall be final and binding upon both parties to the dispute, except in so far as they shall contain a money award. In case a dispute arises involving an interpretation of the award the division of the Board upon request of either party shall interpret the award in the light of the dispute.

"(n) A majority vote of all members of the division of the Adjustment Board shall be competent to make an award with respect to any dispute submitted to it.

"(o) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to make the award effective and, if the award includes a requirement for the payment of money, to pay the employee the sum to which he is entitled under the award on or before a day named.

"(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time

limit of such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the District in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions of law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board.

"(q) All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after.

"(r) The several divisions of the Adjustment Board shall maintain headquarters in Chicago, Illi-

nois, meet regularly, and continue in session so long as there is pending before the division any matter within its jurisdiction which has been submitted for its consideration and which has not been disposed of.

"(s) Whenever practicable, the several divisions or subdivisions of the Adjustment Board shall be supplied with suitable quarters in any Federal building located at its place of meeting.

"(t) The Adjustment Board may, subject to the approval of the Mediation Board, employ and fix the compensations of such assistants as it deems necessary in carrying on its proceedings. The compensation of such employees shall be paid by the Mediation Board.

"(u) The Adjustment Board shall meet within forty days after the approval of this Act and adopt such rules as it deems necessary to control proceedings before the respective divisions and not in conflict with the provisions of this section. Immediately following the meeting of the entire Board and the adoption of such rules, the respective divisions shall meet and organize by the selection of a chairman, a vice chairman, and a secretary. Thereafter each division shall annually designate one of its members to act as chairman and one of its members to act as vice chairman: *Provided, however,* That the chairmanship and vice chairmanship of any division shall alternate as between the groups, so that both the chairmanship and vice chairmanship shall be held alternately by a representative of the carriers and a representative of the employees. In case of a vacancy, such vacancy shall be filled for the unexpired term by the selection of a successor from the same group.

"(v) Each division of the Adjustment Board shall annually prepare and submit a report of its activities to the Mediation Board, and the substance of such report shall be included in the annual report of the Mediation Board to the Congress of the United States. The reports of each division of the Adjustment Board and the annual report of the Mediation Board shall state in detail all cases heard, all actions taken, the names, salaries, and duties of all agencies, employees, and officers receiving compensation from the United States under the authority of this Act, and an account of all moneys appropriated by Congress pursuant to the authority conferred by this Act and disbursed by such agencies, employees, and officers.

"(w) Any division of the Adjustment Board shall have authority, in its discretion, to establish regional adjustment boards to act in its place and stead for such limited period as such division may determine to be necessary. Carrier members of such regional boards shall be designated in keeping with rules devised for this purpose by the carrier members of the Adjustment Board and the labor members shall be designated in keeping with rules devised for this purpose by the labor members of the Adjustment Board. Any such regional board shall, during the time for which it is appointed, have the same authority to conduct hearings, make findings upon disputes, and adopt the same procedure as the division of the Adjustment Board appointing it, and its decisions shall be enforceable to the same extent and under the same processes. A neutral person, as referee, shall be appointed for service in connection with any such regional adjustment board in the same circumstances and manner as provided in paragraph

(l) hereof, with respect to a division of the Adjustment Board.

"Second. Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this Act, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board."